THE SUPREME COURT AFTER REHNQUIST

CASS R. SUNSTEIN, JEFFREY ROSEN, MARISA KATZ

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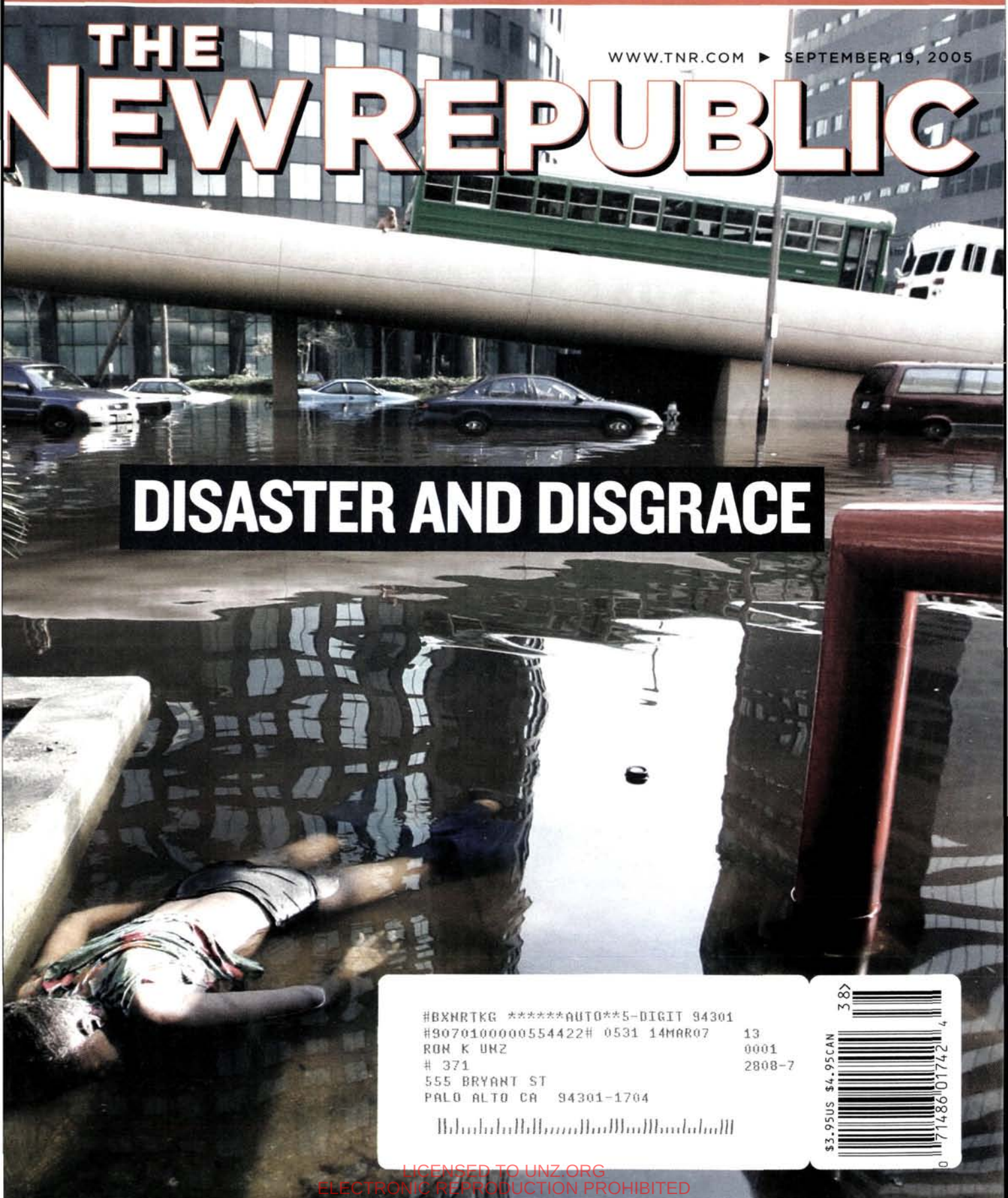

DISASTER AND DISGRACE

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A JOURNAL OF POLITICS AND THE ARTS

SEPTEMBER 19, 2005 WASHINGTON, D.C. ISSUE 4,731 VOLUME 233

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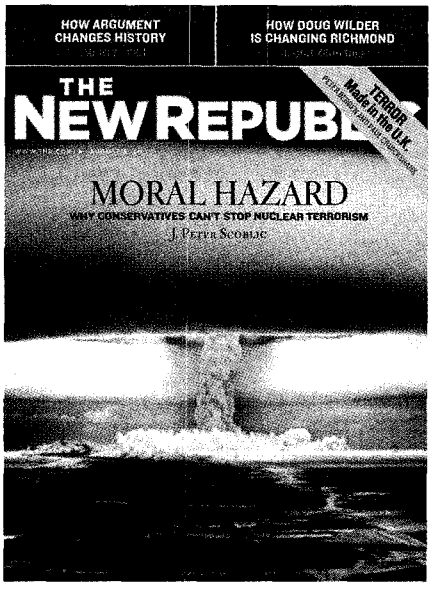
CORRESPONDENCE

FOOD FIGHT

JONATHAN COHN'S ARGUMENT IN favor of taxing certain kinds of foods rests primarily on the notion that, because government must bear some of the costs of the consequences, it has the right to influence behavior ("Body Politics," August 8). This is logical in itself but ultimately self-defeating. By this logic, the government should be able to tax missed hours of sleep, because, if a sleepy driver causes an accident, the roadway must be cleaned and repaired with taxpayer money. He identifies one truism, although I assume it's not one that he would want to trumpet loudly from the rooftops: Once government gets actively involved in an area of life, that thing becomes a tarbaby of almost endless extensions of government authority. Medicare and Medicaid now provide perfect cover for government interference in some of the most personal choices someone makes. Notably, Cohn does not draw his argument to its logical conclusion, which is that the absurdity of taxing foods to influence what people eat is an excellent indicator that the government is overreaching and needs to reduce, not increase, its scope.

JIM MCCARTHY
Altadena, California

THE TWINKIE TAX IS A REALLY BAD idea. It presupposes comprehensive knowledge about the health consequences of foods, and it assumes that this scientific knowledge will percolate its way through the political process and be accurately embodied in the tax code. What's more, recall that, not so long ago, the villains in our refrigerators were thought to be eggs and butter, because of their high cholesterol content. Now we know that only about 15 percent of the cholesterol in our systems is ingested; we synthesize the balance, and eggs are considered relatively benign. For years, margarine was thought to be preferable to butter; now we know it's really not. But, if a Twinkie tax had been enacted ten years ago, butter, eggs, and even whole milk might have been taxed. And taxing food based on its presumed propensity to harm us is surely the thin end of the wedge. What next?


HOW ARGUMENT CHANGES HISTORY
HOW DOUG WILDER IS CHANGING RICHMOND
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TERROR Made in the U.K.
MORAL HAZARD
WHY CONSERVATIVES CAN'T STOP NUCLEAR TERRORISM
J. PETER SCOBLIC

Taxes on salt, sugar, caffeine, carbohydrates, soda pop, the flesh of four-footed animals, or anything else that a sufficiently vocal pressure group considers unhealthy? And what about differences in our individual metabolisms? Why tax Peter, who can eat anything and not gain weight, to protect Paul from obesity? Many things can and should be done to improve our eating habits, but the Twinkie tax should not be part of the package.

MICHAEL JORRIN
Ridgefield, Connecticut

FREAKED OUT

IN STEVEN D. LEVITT'S THOUGHT-provoking *Freakonomics*, nicely reviewed by Cass R. Sunstein, it is suggested that numbers of police rather than innovative techniques—e.g., Rudolph Giuliani's "broken windows" approach—reduce crime rates ("Super Freak," July 25). But quantitative analyses should not be allowed to obscure qualitative ones. What if a study revealed a strong association between the average weight of a football team's offensive line and its rate of victory? Should a team institute a regimen of round-the-clock moonpies, pork rinds, and beer in an effort to win the championship? In the New York example, Levitt notes that the New York police force was undergoing rapid expansion concurrent with Giuliani's new approach. As anyone who has experienced the expansion of an organization can appreciate, it is very difficult to handle an influx of new personnel without a loss of efficiency. Isn't it possible that Giuliani's new strategies allowed the NYPD to make full, immediate use of the new officers? Levitt's scholarly work may have addressed this important issue, but his book did not.

In his review, Sunstein raised other such concerns about *Freakonomics*, but concluded, "This is ... the confidence of social science. ... that with the right data, we might well be able to make progress in resolving some of society's most intractable perplexities." Perhaps. But social scientists cannot easily conduct the most rigorous of investigations (for example, randomizing ten cities to standard police techniques and ten matched cities to an innovative approach). While it is better than no information at all, broad analyses like Levitt's can mislead and run the risk of muddying public discourse.

ANDREW REISNER
Newtonville, Massachusetts

MISSING LINK

IT IS INACCURATE TO SAY THAT INTELligent design is not supported by any "legitimate scientist" (Notebook, August 15). Evolution, on the anatomical level, seems very consistent with the archeological record, but, on the biochemical level, it is unverifiable. It is true that intelligent design is a subterfuge for religion, but it is equally true that no biochemist could explain the evolution of any number of physiological systems based solely on the archeological record.

STEPHEN KRAUSZ
Denver, Colorado

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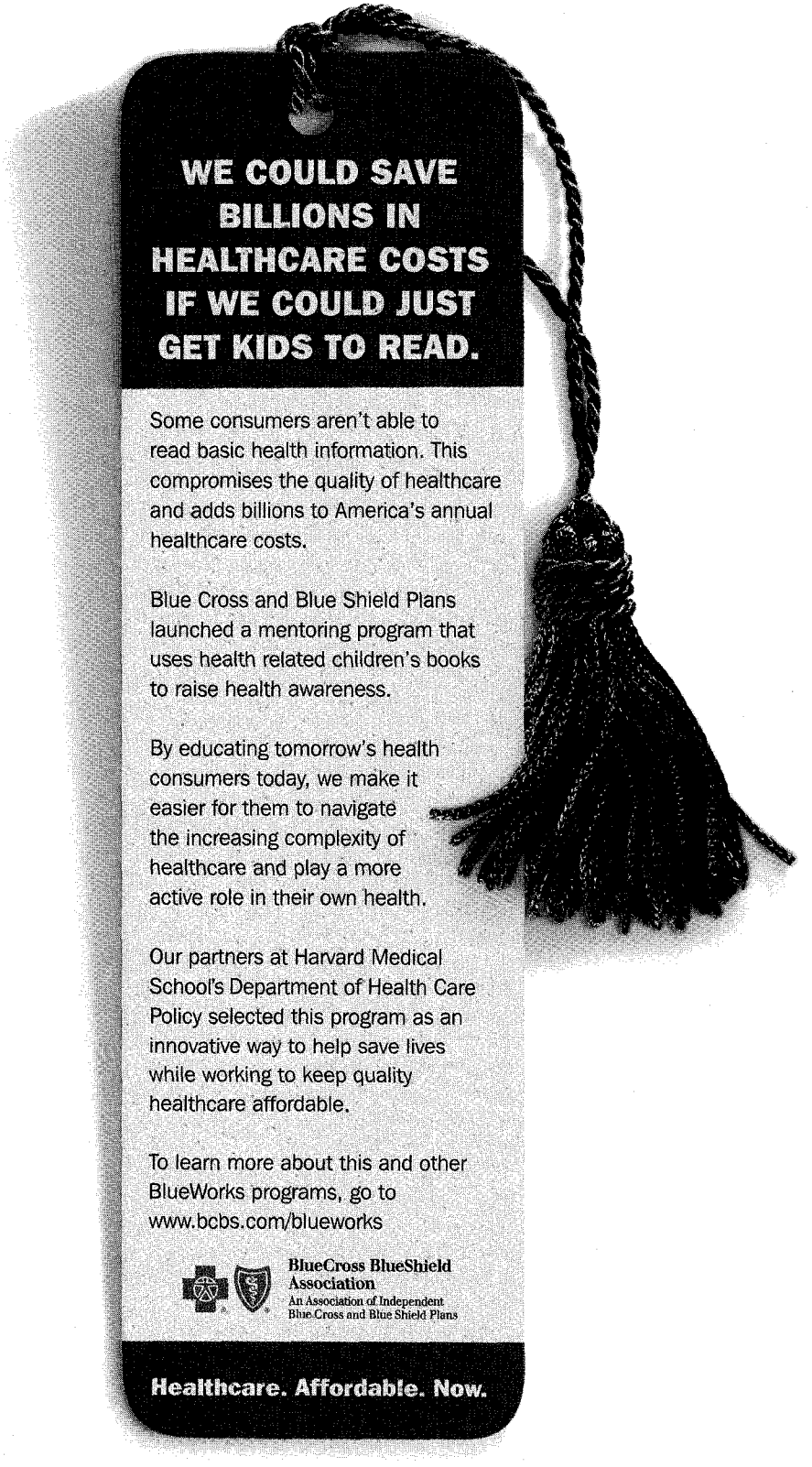
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Poverty Line

TRB
FROM WASHINGTON

It took a few days after New Orleans flooded for the press to breach the mental levee blocking comments on the victims' race and class. But, once that levee finally broke, it washed away pretty quickly. In a furious rant on Thursday, CNN's Jack Cafferty lashed out at journalists' unwillingness to take on the "elephant in the room" and complained that "almost every person we've seen, from the families stranded on their rooftops ... to the people holed up in the Superdome, are black and poor." Thereafter, the major networks got in on the action, and, by Sunday, a Fox roundtable was debating Condoleezza Rice's concession that "we do, I think, at some point, need to see that people couldn't evacuate who were poor ... [and] understand better how to make sure that that doesn't happen again."

The good news is that we're about to have a long overdue debate about poverty in this country. The bad news is that most of the commentary so far has focused only on poverty as an economic condition. Cafferty observed that "many of [Hurricane Katrina's poor victims] didn't follow the evacuation orders because they didn't have the means to get out of town." Former Senator John Edwards stressed the low rates of car ownership among New Orleans's poor and their need to protect possessions they couldn't afford to replace. That view was echoed among politicians further to his left. "There's a whole segment of society that's being left behind," wrote Representative John Lewis in *Newsweek*. "When you tell people to evacuate, these people didn't have any way to leave."

Implicit in these arguments is the idea that poor people are pretty much like everyone else, just with less money. From this, it follows that the remedy is primarily financial. Consider Lewis's proposed solution not just for New Orleans but for the problem of urban poverty in general: "[I]n rebuilding, we should see this as an opportunity to rebuild urban America. ... There must be a commitment of billions and billions of dollars."

But, if anything, the flooding of New Orleans teaches the opposite lesson—that the problem of poverty isn't just economic, it's also sociological. On Monday, *The New York Times*' Jodi Wilgoren bylined what may be the most important piece of Katrina coverage to date. Wilgoren followed two families struggling to evacuate New Orleans in the flood's aftermath: one white and middle class (though hardly affluent, as Wilgoren notes), the other black and poor. The outcome of the story will surprise no one. The first family quickly found comfortable accommodations in a northern Louisiana hotel, then a semi-permanent home in a nearby town. As of Saturday, the second family was still shuffling from one endless line to another—hungry, unshowered, unsure of its next move.

What's fascinating are the ways in which the two families navigated, or failed to navigate, the crisis. The matriarch of the middle-class family, a local court clerk, tapped a cousin to secure a low corporate rate at the Lafayette Hilton. She paid for it with her American Express card. The woman then worked connections in local government and churches to land a scarce rental property. She even won a dispensation from local authorities to sneak back into her abandoned house in a quarantined area so she could rescue some televisions and furniture.

Needless to say, the poorer family had no such advantages. The husband had never been out of New Orleans before; the wife had never flown on a plane. Neither appeared to have contacts capable of assimilating them into another community; in any case, the concept of doing so seemed altogether unimaginable to them. And, while the family had $2,000 in savings, they didn't have a bank account. Their money burned up along with their apartment in a fire that followed the flood.

Clearly, a lack of money is far from the only handicap afflicting the poor. They lack the basic life skills, social networks, and general sense of agency that even the slightly more affluent—working-class people—take for granted. The poor black family in Wilgoren's piece certainly could have benefited from a car or a few hundred dollars in aid. But much more valuable would have been instructions beforehand on how to open a bank account. Everyone else learns these sorts of things by following the example of relatives, friends, and neighbors. The problem with acute concentrations of poverty is that they afford few such examples.

Sociologists, of course, are keenly aware that poor people need to be integrated into society as much as they need financial help. But, sadly, there isn't much of a political constituency for this idea. Liberals like Lewis tend to focus either on redressing racial grievances or on the immediate needs of their constituents: food, health care, a subsistence wage. And, with the needs so great, it's hard to blame them. Conservatives do frequently invoke sociology in their analysis of poverty. But, too often, they do it either as an excuse for not spending money, or out of a preoccupation with personal morality. Yet, while out-of-wedlock births, for example, are clearly a problem in New Orleans, they don't entirely explain why so few poor, black New Orleanians were incapable of protecting themselves from the flood. (The black couple in Wilgoren's piece was married, after all.)

It turns out that poverty, like disaster relief, is one of those problems that demands pragmatism and technical competence rather than ideology. In the 1990s, technocrats in the Clinton administration ramped up initiatives like Hope VI and Section 8 housing vouchers—two highly effective programs for integrating the poor into mixed-income neighborhoods. Technocrats outside the administration have led the way since then. In Washington, for example, two former management consultants recently founded a publicly funded boarding school called SEED, which imparts life skills and career expectations every bit as much as it tends to the economic privation of its poor, urban students. SEED graduates attend college at remarkably high rates. Both programs reflect the spirit of non-ideological problem-solving that has been out of fashion amid the hyper-partisanship of the Bush era. Now that Katrina has revived our interest in poverty, it'd be a shame if she didn't revive that spirit, too.

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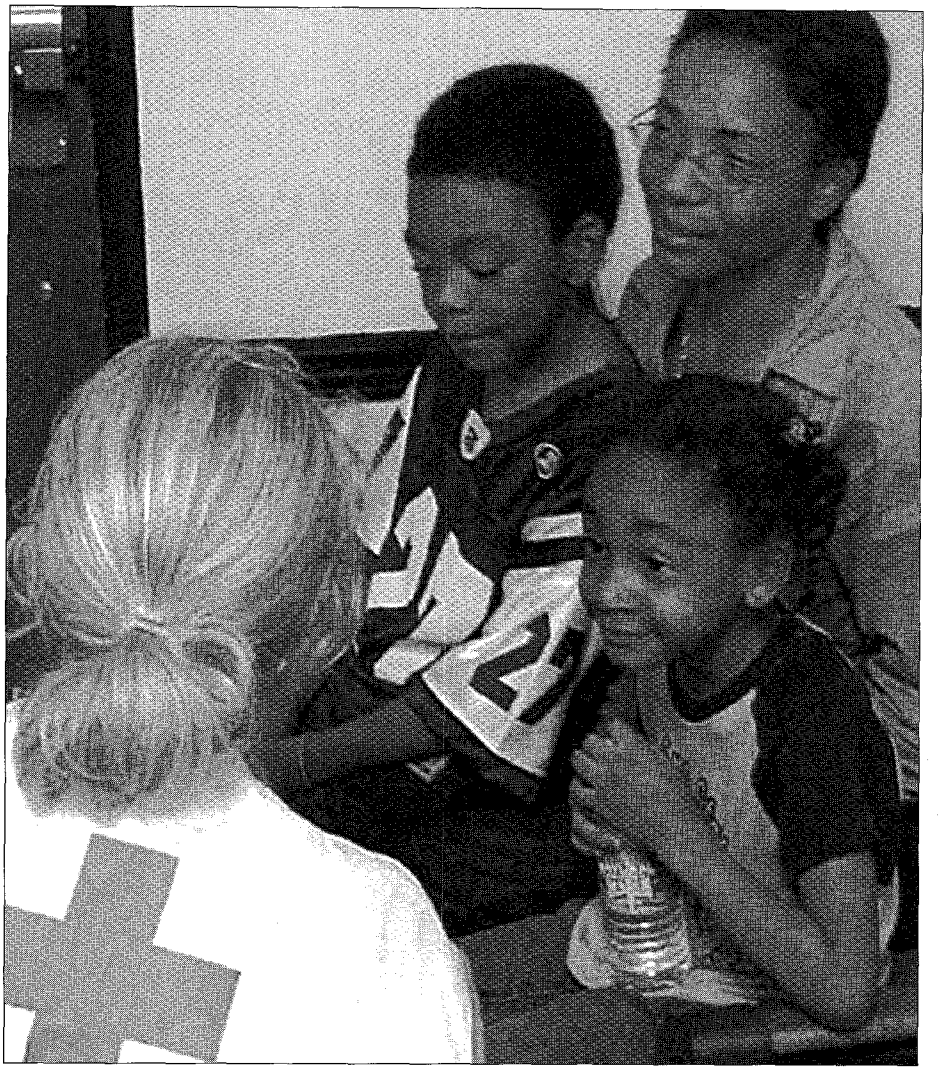

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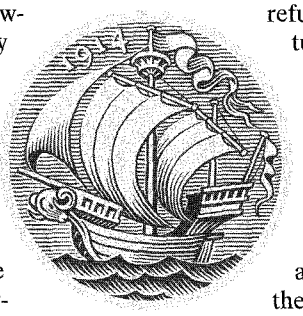
Katrina

BUT THIS IS AMERICA. In sorrow, in rage, but mainly in incredulity, as the images of the suffering in New Orleans and its region began to rip at the eyes and the minds of the entire country, Americans were heard to say, in one way or another: *But this is America.* The mass pain that was inflicted by Katrina was not only tragic, it was incoherent. For Americanism is significantly the faith that such evils do not happen here. It is the doctrine of insulation. That is why many people wish to come here: They believe that here they may escape the malevolences of history and nature, that here they will be in some unprecedented way safe, and strangers to tragedy. Americans are always so shocked when they turn out not to be exceptions to the universe. Their president also: "The people we're talking about are not refugees," President Bush insisted. But they are plainly refugees, and these refugees will be a feature of American life in many states for many months and even years to come. When was the last time that the noun "refugee" was modified by the adjective "American"? So the Americanist innocence, too, was drowned in Katrina's waters. Our invulnerability is not perfect. The storm beat us.

But this is America. The words were not a protest only against the flood. They were a protest also against the aftermath of the flood, which was not a natural catastrophe but a human one. Americanism is also the conviction that the wretchedness of large numbers of Americans is unacceptable, an offense to the American idea, a spur to American action. We take care of our own, and our efficiency is a measure of our decency. But when our efficiency fails us, we must conclude that our decency failed us, too. "No insignificant person was ever born," Bush unforgettably declared in his first inaugural address. How significant, exactly, were the persons who waited for days for relief and rescue from the Superdome and the Convention Center and the other makeshift purgatories, while the rest of the country watched their dehumanization on television? We did not take care of our own, not swiftly, not fiercely, not as if nothing in the world was more important to us. The natural fury that caused this misery should have been met with a human fury to alleviate it. It was not.

More, the American belief in American decency is, to a large extent, a belief in American government. For all the suspicion of power upon which this country was founded, the view of government as a force for ill has never really prevailed in America, because it would have defeated the American hunger for justice. American history over the last hundred years is a stirring tale of government in the proud and largely effective service of compassion. Consider also the ironic history of the Bush administration, the many times that human need, real and imagined, at home and abroad, has required it to betray its philosophy of small and limited government. Sometimes "we" cannot take care of our own; only our government can. In times of emergency, the power of the federal government may be a beautiful thing. When Bush finally flew to the devastation, he said: "In America, we do not abandon our fellow citizens in our hour of need. And the federal government will do its part." Its part? *But this is America.* Sometimes the federal government's part is the whole, or most of it. This should have been so in the early hours, when the local and state authorities showed their fecklessness. Instead, micro-incompetence was succeeded by macro-incompetence.



And by our own, we mean all of our own. Disasters often reveal how we live. One of the most chilling things in New Orleans last week was the extent to which all of us were not represented in the crisis. The some of us who suffered were overwhelmingly poor and black. If you did not see race and class, you were blind. Barbara Bush saw race and class, and expressed race and class, when she visited the Houston Astrodome: "And so many of the people in the arenas here, you know, were underprivileged anyway. So this is working very well for them."

But the people living in the refugee camp on the Astroturf are not underprivileged, they are destitute. The good news is that most Americans did not respond like the overprivileged former first lady. Near and far, they saw race and class and they rushed to help—thereby shaming their government, which is one of the duties of civil society. Now American government will no doubt demonstrate its capacity for good, but it is not American government, with its briefings and its drop-bys, that will have preserved American solidarity. There were no heroes in office, but there will have been heroes. Perhaps this really is America. ■

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NOTEBOOK

CUSSING GENERAL IN COMMAND . . . HERB KOHL, NOTHING BUT BLAND

JOHN WAYNE DUDE

FACED WITH A CRISIS, PEOPLE LOOK for a leader who inspires confidence. Unfortunately, confidence was largely absent in the government's response to Hurricane Katrina last week. But it could be found in abundance in the form of Lieutenant General Russel Honoré, the commander of the military's Katrina relief efforts, who may be quietly—or loudly, truth be told—building a case for Man of the Year. Honoré's take-charge attitude has endeared him to the public like no one since former New York City Mayor Rudolph Giuliani in the aftermath of September 11. "He came off the dog-gone chopper, and he started cussing, and people started moving," said New Orleans Mayor Ray Nagin, who admiringly dubbed the general "one John Wayne dude." While Homeland Security Secretary Michael Chertoff delicately assured reporters at a press conference on Monday that "we're all working well together," Honoré was a tad more blunt. "That's B.S.," he said of the suggestion that relief had been hampered by bureaucratic infighting.

Perhaps. But, for Katrina's victims, at least, Honoré is certainly a welcome contrast to administration officials who spent the past week dithering and pointing fingers at state and local authorities. On "Meet the Press," Chertoff stated that the only way to have avoided disaster in New Orleans was to have completely evacuated the city, a responsibility that "rests with state and local officials." Meanwhile, President Bush called the results "not acceptable," but complimented FEMA Director Michael Brown last Friday, saying, "Brownie, you're doing a heck of a job." Well, to quote Honoré: "That's B.S."

SECOND HOMELESS

"THIS COUNTRY IS COMING TOGETHER to help people who hurt," Bush told us last Sunday. Indeed, the hurt of

Russel Honoré

Senator Trent Lott, who lost his Pascagoula, Mississippi, beach house to Katrina, has managed to bring even the worst of political enemies together. Although there are, as yet, no official plans for the Gulf Coast's reconstruction, Bush pledged on September 2 that, at the very least, "out of the rubbles of Trent Lott's house . . . there's going to be a fantastic house, and I'm looking forward to sitting on the porch." Two days later, Lott reported that, not to be outdone, Teresa and John Kerry had called and asked what they could do.

Of course, it's absurd that Lott should come to represent the human face of this disaster. The house Lott lost was not his only one. (His primary residence—in Jackson, Mississippi—was undamaged.) And it's particularly ironic that, in a tragedy whose victims are disproportionately poor and black, people should rally around Lott, who had to resign his position as majority leader after making comments sympathetic to segregation.

But rest assured: Disaster has made Lott a new man. On MSNBC's "Hardball" on Friday, he declared: "When our people down there suffer, I suffer." Delighted with the phrase, he repeated it on CNN's "Anderson Cooper 360°." "When the people on the Mississippi Gulf Coast suffer, I suffer. . . . I'm one of them," he insisted.

Despite his emphasis on the Everyman nature of his plight, Lott couldn't resist telling Wolf Blitzer, "That house was 150 years old" and in a "quaint little neighborhood." Good thing the Kerrys are on the scene—perhaps they could even donate one of their five properties to the vacation home–less Lotts. We suggest their Ketchum, Idaho, getaway, a $5 million house built from a fifteenth-century barn imported from England. An address in Idaho, where a mere 0.4 percent of the population is black, compared with Mississippi's 36 percent, would make Lott's claim to be "one of them" marginally less contemptuous.

PALESTINIAN ECUMENISM

IN LAST WEEK'S CORRESPONDENCE section, Episcopal Bishop C. Christopher Epting complained, among other things, that "it is presumptuous and outrageous of [Martin] Peretz to assert the baseless charge that Palestinian Christians don't want to live in a Palestinian state." Alas, the chilling statistics of the gradual Christian abandonment of Palestine to the Muslims makes hash of the bishop's silly but portentous statement. Baseless charge, indeed. And, here for the education of the Church's deputy for ecumenical and interfaith relations, and for other doubters of the fate of Christians in Palestine, is the gist of a news account in *Haaretz* headlined "MUSLIMS TORCH 14 CHRISTIAN HOMES NEAR RAMALLAH": At least 14 houses belonging to Christian residents of Taybeh, a village near Ramallah, the capital of the Palestinian Authority, were burned

DAVID COWLES

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down by Muslims from neighboring Dir Jarir. A Taybeh resident reported that several dozen young men threw Molotov cocktails at the houses, "which began to go up in flames, one after another." Entire families are now homeless, and stores, a farm, and a gas station were also torched. The eyewitness, the sister of the town's mayor, went on to say, "We urge all international, Israeli, and Palestinian actors to intervene and protect village residents from Muslim rage." And what was the rage about? The family of a 23-year-old Muslim woman suspected her of carrying on a romance with a Christian man from Taybeh. And what happened to the woman marked with the scarlet letter? She was killed by her relatives and quickly buried. This might be news from another planet. But it's not. It's news from Palestine.

SENATOR GUILELESS

WHEN THE SENATE JUDICIARY Committee begins the John Roberts confirmation hearings next week, one of the questions concerned Democrats should ask themselves is, "Who is Herb Kohl, and why is he here?" Elected in 1988, the millionaire philanthropist and pro basketball franchise owner from Wisconsin has distinguished himself as an amiable and decent fellow—but not much else. *The Almanac of American Politics* describes him as a man of "seemingly little guile"—a quality that may be charming in, say, a favorite uncle, but is a serious liability in politics. And, indeed, it's nearly impossible to recall an important battle that Kohl has ever led on his party's behalf. Though he has no legal training, Kohl's Senate seniority translates into a choice seat on the influential Judiciary Committee, where he is widely expected to be a nonentity during the confirmation of Roberts and whomever Bush nominates to succeed Sandra Day O'Connor. At a time when Democrats are desperately trying to gain ground, the party needs to put its best face forward. Herb Kohl isn't it. ■

TNR commentary Excerpts from THE NEW REPUBLIC *ONLINE*

AMERICANS DISCOVER POVERTY. AGAIN.

Poor Attention

By Marisa Katz

Last week, poverty was discovered in the United States. And it wasn't pretty. *The New York Times* was among the first with the news, running a hurricane-related story headlined, "FROM MARGINS OF SOCIETY TO CENTER OF THE TRAGEDY." *The Washington Post* also got wind of the poverty scoop. "They are the Other, these victims of Katrina. And in this country, the Other is black. Poor. Desperate," revealed a Style section essay. Soon, cable news stations began running segments like "The Cost of Being Poor."

Of course, none of this should be news. A large proportion of the country has long suffered debilitating poverty that limits life choices and life prospects. And, although poverty is by no means confined to African Americans, race and socioeconomic status are often intertwined. The problem should be obvious. Yet each generation of Americans seems to make the discovery anew.

A large proportion of the country has long suffered debilitating poverty that limits life choices and life prospects. The problem should be obvious. Yet each generation of Americans seems to make the discovery anew.

The news stories of recent days recall the writings of antipoverty crusaders of times past, namely Jacob Riis circa 1890 and Michael Harrington circa 1962. As with the contemporary accounts, Riis and Harrington described the country's poor as the invisible Other; Riis's seminal work was titled *How the Other Half Lives*, while Harrington wrote *The Other America*. Like the media personalities of today, both strove to open the eyes of more fortunate Americans to the poverty that had escaped their notice. The same sense of breathless discovery, the same indignation, was echoed in the coverage of the victims of Hurricane Katrina.

So, once again, the American poor have the country's attention. It can be hoped that good public policy will result. After all, Riis's book led to tenement housing reform. And Harrington was integral to the war on poverty. If we're going to make any progress, though, it will have to be soon. We know from experience: The attention won't last long. (See Noam Scheiber, "Poverty Line," page six.)

WHY ROBERTS SHOULDN'T TESTIFY.

Hearing Loss

By William J. Stuntz

Will John Roberts be cool under fire? How much fire will he take? Will Senate Democrats be tougher on him now that he is due to become chief justice, or will they go easier since he is filling the seat of a fellow conservative? What moves will his opponents make? What countermoves will Senate Republicans make to protect him?

The likely answers are: yes, not much, probably easier, unclear but nothing too damaging, and few—they'll keep their powder dry for the next battle. But it's already too late to make the best move of all, for both sides: Cancel the hearings. Or at least scratch Roberts from the witness list.

That sounds crazy, and it's politically unthinkable. But the current style of hearings harms the Court, discredits the Senate, and encourages presidents to pick weak nominees. This is one political ritual we'd be better off without.

The current style of hearings harms the Court, discredits the Senate, and encourages presidents to pick weak nominees.

Televised hearings direct attention *away* from the nominee's record and toward personality quirks and low-level scandals: Robert Bork's beard, Clarence Thomas's taste in videos. Republicans sometimes complain that these hearings are too ideological, that the only legitimate issue is the candidate's temperament. They have it backward. Live hearings are always about temperament—which is precisely the problem. The ins and outs of separation-of-powers law doesn't make for good television. Video rentals do.

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Liberals shouldn't fight Roberts.

Stare Decisis

BY JEFFREY ROSEN

MOMENTS AFTER PRESIDENT Bush nominated John Roberts to be chief justice of the United States, liberal interest groups again urged Democratic senators to vote against the nominee. "ROBERTS UNFIT TO BE CHIEF JUSTICE," People for the American Way charged in a hyperbolic press release. The group had opposed Roberts's nomination to replace Justice Sandra Day O'Connor on the grounds that he would seek to limit Congress's ability to protect the environment and prevent discrimination, and it stressed, "To an even greater degree, [his] record makes him unfit for the position of Chief Justice." At the same time, Democratic senators on the Judiciary Committee agreed that Roberts's nomination as chief deserved extra scrutiny. "If the White House wants to elevate him to an even higher position as chief justice, I think it's a higher standard of inquiry," said Senator Richard J. Durbin, the Illinois Democrat.

But the claim that Roberts would move the Court to the right as chief justice—and that he therefore deserves greater scrutiny—is transparently unconvincing. Far from being a proponent of resurrecting the limitations on federal power that some conservatives call the Constitution in Exile, Roberts's memos and judicial opinions suggest, in fact, that he takes a more expansive view of congressional power than O'Connor. Although liberals canonized O'Connor as a moderate after she announced her retirement, they forget that she was among the Court's most enthusiastic and activist proponents of striking down both federal and state regulations. Chief Justice William Rehnquist, by contrast, was a more deferential conservative, less likely to strike down regulations in the name of economic rights.

On many questions involving federalism, Roberts's views resemble those of Rehnquist rather than O'Connor, and, in this sense, he would not change the balance of the Court. And, in other areas of concern to liberals—such as his willingness to uphold precedents with which he disagrees—Roberts may turn out to be more concerned about judicial stability and humility than either Rehnquist or O'Connor, which suggests he might even move the Court to the left. The truth is that Roberts's nomination as chief justice was a peace offering from Bush to Democrats and a gift to principled liberal and conservative defenders of judicial restraint. Rather than listening to the siren song of ideological interest groups who are urging them to cast a symbolic but futile vote of opposition, Democrats should instead vote to confirm Roberts as chief justice with gratitude and relief.

THE MOST NOTABLE area where Roberts would be more deferential to Congress than O'Connor relates to Congress's ability to condition the grant of federal funds on a state's agreement to respect federal law. This is Congress's most significant power over the states—just as significant as its power to regulate interstate commerce, if not more so. For example, federal civil rights laws that forbid state programs and institutions receiving federal funds from discriminating on the basis of race and sex depend on a broad interpretation of Congress's spending power. Similarly, Congress can use its spending power to circumvent the Supreme Court's attempts to strike down federal laws under the Commerce Clause. For example, after the Supreme Court held in 1995 that a federal regulation prohibiting guns in schools exceeded Congress's power to regulate interstate commerce, President Clinton pointed out that Congress could achieve the same result by denying federal funds to the handful of states that refused to prohibit guns in schools on their own.

Along with Justice Clarence Thomas, O'Connor was the Rehnquist Court's most energetic critic of Congress's efforts to impose conditions on federal grants to the states. In 1987, she dissented from a crucial case that upheld Congress's power to deny a portion of federal highway funds to states that refused to adopt 21 as the minimum drinking age. By contrast, Roberts, who participated in the case as an advocate, came to agree with the Court's majority. In a 1999 interview on public radio, Roberts said, "The basic principle is, if you pay the piper, you get to call the tune. And I think the federal government could say, 'If we're giving you money, and it's related to the area in which we're trying to get you to waive sovereign immunity, we can require you to consent to suit as a condition of getting those funds.' " This suggests that Roberts would give Congress more latitude than O'Connor to impose conditions on federal funds.

Roberts confirmed this impression as an appellate judge. Last year, he joined a majority opinion by the scrupulous and moderate Judge Merrick Garland holding that Congress could force the Washington Metropolitan Area Transit Authority to waive its immunity from federal discrimination suits as a condition of accepting federal transportation funds. In that case, an electrician claimed he had been fired from the transit authority because of his bipolar disorder, and Roberts joined Garland in upholding the man's right to bring the suit, over a dissent from Judge David Sentelle, a vigorous proponent of the Constitution in Exile.

Liberal groups who fear Roberts's views on congressional power have focused on a now-famous 2003 opinion in which he questioned the constitutionality of applying the Endangered Species Act to protect a rare species of "hapless toad." According to People for the American Way, "[B]y focusing on the purely intrastate domicile of the particular endangered species, Roberts indicated that he may well subscribe to an extremely constricted interpretation of the Commerce Clause recently rejected by a narrow majority of the Supreme Court." But Roberts indicated no such

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thing. In the hapless toad case, he pointedly declined to join the radical dissenting opinion of Sentelle, and he suggested that the Endangered Species Act might be able to protect the hapless toad under other theories.

Moreover, Roberts's repeated paeans to the importance of judicial deference to legislatures makes it unlikely that he would suddenly reveal himself as an enthusiastic partisan of the Constitution in Exile. When I interviewed Roberts in 2002, he made it clear that he thought the Court should rarely strike down regulations under the Commerce Clause. "Do I think it's a good thing that at least once every 30 years, the Supreme Court says something that motivates Congress to focus a little more closely on why it's regulating in a particular area? Yes, I do think that's good," he told me. But he went on to emphasize, "There has to be a lot of legal room in the joints, and the Supreme Court has to remind itself on a daily basis that it occupies tenuous ground."

THE FINAL AREA involving the Constitution in Exile where Roberts seems to the left of O'Connor, and perhaps even Rehnquist, involves Congress's power, under the Fifth Amendment, to take private property with just compensation. As a law student, Roberts wrote a note rejecting a rigid libertarian reading of the Takings Clause. "[T]he words of the clause ... are incapable of being given simple, clear-cut meaning," he wrote. "Indeed, the very phrase 'just compensation' suggests that the language of the clause must be informed by changing norms of justice." At his confirmation hearing for the D.C. circuit, Roberts joked, "I would, if confirmed as a circuit judge, follow Supreme Court precedent in this area, as in any other. I would not follow my student note; no one else has." Nevertheless, Roberts won the admiration of environmentalists as an appellate advocate when he argued that a development freeze in Lake Tahoe did not unconstitutionally take the property of local residents. The Supreme Court agreed with Roberts in a 2002 opinion that, according to Douglas Kendall of the liberal Community Rights Counsel, "stopped the takings movement in its tracks." Writing in *The Washington Post*, Kendall praised Roberts for writing "the best legal brief I've ever read in a takings case" and for his "ability to see both sides of a divisive issue." Nor was Roberts merely representing environmentalists as a hired gun: In his Senate questionnaire for his appellate nomination, he emphasized that the Lake Tahoe opinion "shows a robust regard for the need for government regulators to be afforded broad flexibility in undertaking vital environmental measures."

In addition to Roberts's views on congressional power—which will be properly scrutinized by Judiciary Committee Chairman Arlen Specter—Democrats are concerned about whether he will vote to reverse 5–4 decisions involving abortion, affirmative action, and school prayer, in which O'Connor was in the majority. Ultimately, Roberts's votes in those cases will depend on his views about what the lawyers call stare decisis, or "let the decision stand," and those views are not likely to be fully formed until he actually joins the Court. (As a lower court judge, he had no need to develop a theory about whether or not to follow Supreme Court opinions with which he disagreed; he was obliged to do so.) In meetings with senators, however, Roberts has repeatedly praised the values of judicial humility and stability.

In his Supreme Court questionnaire, he wrote, "Precedent plays an important role in promoting the stability of the legal system, and a sound judicial philosophy should reflect recognition of the fact that the judge operates within a system of rules developed over the years by other judges equally striving to live up to the judicial oath." Roberts appears to care much more about the institutional legitimacy of the Supreme Court than, for example, Thomas, who, according to his colleague Justice Antonin Scalia, will vote to overturn any precedent with which he disagrees. Roberts told the Senate that "a judge needs the humility to appreciate that he is not necessarily the first person to confront a particular issue." By contrast, neither Rehnquist nor O'Connor was noted for their humility in following precedents with which they disagreed.

OF COURSE, ROBERTS is unlikely to be to the left of Rehnquist and O'Connor in all cases, and, on several issues, Democrats (as well as Republican libertarians) would be perfectly justified in questioning him closely. He appears to take a far broader view of police powers than O'Connor. And his inclination to defer to the executive in the war on terrorism may surpass that of Rehnquist, who joined O'Connor and the pragmatic liberal justices in holding that enemy combatants who are U.S. citizens could not be detained indefinitely without access to lawyers and fair hearings (see Marisa Katz, "Power Tool," page 14). Even in these areas, however, Roberts's views still seem closer to the views of moderate Democrats like Charles Schumer (who is consistently tough on terrorism and crime) than the more libertarian candidates on Bush's shortlist, who tend to support limiting federal power across the board.

It also seems possible (although not certain) that Roberts would vote to reaffirm at least some of the opinions that O'Connor joined in cases involving the culture wars. On what grounds, then, could Democratic senators vote to oppose his nomination? Aside from a desire to pander to liberal interest groups, Democrats could argue that senators should feel free to oppose any Supreme Court nominee whose constitutional views they can't embrace in all respects. But this is a novel and utopian standard; it would be politically foolish for Democratic senators to embrace it. Such a rigorous standard would come back to haunt Democrats in the imminent confirmation hearings for O'Connor's successor. And it would cast a pall over the confirmation hearings of future Democratic nominees, if Democrats win back the White House sometime in the next century. Democratic senators should recognize that, although they may not agree with every one of Roberts's views, they and the country almost certainly couldn't do better. ■

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Liberals should fight Roberts.

Power Tool

BY MARISA KATZ

"I DON'T HAVE a litmus test," President Bush has said of his process for selecting judicial nominees. "When the nominees come before people in my administration, we don't say, 'What is your specific position on that issue or another issue?' What we say to the person is, 'What is your judicial temperament?'" Although it is disingenuous for the president to claim that he doesn't care where his Supreme Court nominees stand on abortion or gay rights, it may be true that he has more philosophical concerns in mind. Indeed, this administration has clashed with the courts most vigorously over the somewhat elusive issue of presidential power. And there's a strong case to be made that Bush plans to use his Supreme Court appointments, above all, to make the Court more president-friendly.

The Bush White House has been unusually candid about its drive to defend and strengthen the executive branch. Bush has declared repeatedly: "I have a duty to protect the executive branch from legislative encroachment." Vice President Dick Cheney has been even more forthcoming: "I've seen a constant, steady erosion of the power and the ability of the president to do his job. We've seen the War Powers Act and [Congressional Budget and] Impoundment Control Act. And, time after time after time, administrations have traded away the authority of the president to do his job. We're not going to do that in this administration. The president's bound and determined to defend those principles and to pass on this office, his and mine, to future generations in better shape than we found it."

Much of the "erosion" of presidential authority, however, took place after Vietnam and Watergate, in the interest of making the executive more transparent and accountable. Reviving the imperial presidency also means reviving the risk that this power will be abused. And, in the midst of an indefinite war against a new kind of enemy, the result could be particularly damaging.

So far, perhaps the biggest obstacle to Bush's expansion of presidential power has been the Supreme Court, and, in particular, Justice Sandra Day O'Connor. Chief Justice William Rehnquist, on the other hand, tended to show more deference to executive authority. Without Rehnquist or O'Connor, which way will the Court now trend? The public record of nominee John Roberts gives every indication that he would be more like Rehnquist than O'Connor on the issue of executive power. And he might go even further. A Chief Justice Roberts, bolstered by a second Bush appointee, could lead the Court to set dangerous precedents that undermine public accountability, civil liberties, and the balance of powers—the very foundations of U.S. democracy.

OVER THE PAST five years, the White House has made grab after grab for expanded executive authority while Congress simply acquiesced. Some of this maneuvering has taken place—at least ostensibly—in the context of Bush's amorphous war on terrorism. For example, the administration has granted itself wide latitude to detain, interrogate, and prosecute terrorist suspects without regard to international treaty commitments or domestic legal standards. At the same time, the administration has created state secrets at a blinding pace. In 2004, executive agencies reported 15.6 million classification decisions, compared with 3.6 million in 1995, according to the Information Security Oversight Office. The explanation: national security. But the same obsession with secrecy and executive prerogative has applied to other domains, too. Most prominently, there was Cheney's refusal to turn over details about his energy task force meetings—and specifically the role of energy industry executives—to the Government Accountability Office. Other power plays have slipped by with less uproar. The release of a substantial portion of Roberts's papers is being blocked by the administration under the auspices of an executive order that Bush signed, back in November 2001, giving the president unprecedented power to withhold the records of past presidents and their aides. "In relation at least to our recent expectations, dating back to the late '60s and '70s, this administration is protecting information at a higher level than other presidents have done," says Columbia University historian Alan Brinkley.

The Supreme Court has acted at times to check this power grab, thanks largely to O'Connor. Writing for a four-justice plurality in *Hamdi* v. *Rumsfeld* last year, she rejected the administration's argument that it had unilateral authority to designate and detain Americans as "enemy combatants." "We have long since made clear that a state of war is not a blank check for the president when it comes to the rights of the Nation's citizens," she wrote.

In contrast, Rehnquist tended toward the other end of the spectrum on presidential power. He sided with O'Connor in *Hamdi*, but he also joined the dissent of Justices Antonin Scalia and Clarence Thomas in *Rasul* v. *Bush*. In that case, the 6–3 majority ruled that foreigners, too, were entitled to contest their classification as enemy combatants. More significantly, Rehnquist was known for his especially deferential take on executive authority in *Dames & Moore* v. *Regan*. This 1981 decision has been criticized for the less-than-intuitive way it pieced together a legal authorization for the president to suspend private lawsuits against the Iranian government as part of the agreement that ended the hostage crisis. "Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement," Rehnquist wrote. In other words, where Congress does not place ex-

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How Do the Leading Colleges and Universities Compare?

Scoring the Nation's Leading Colleges and Universities on Their Success in Drawing Students of All Races From the Ranks of Lower-Income Families

Students from low-income families are one of the great untapped resources in the United States. Yet a large majority of America's leading colleges and universities are not educating an acceptable number of students from this group.

Number and Percentages of All Undergraduate Students of All Races Who Received Federal Pell Grant Awards for Low-Income Students (Ranked by the Highest Percentage of Pell Grant Awards in the Academic Year Beginning in the Autumn of 2003)

HIGH-RANKING RESEARCH UNIVERSITIES

University	Total Pell Grant Recipients	Percentage of All Undergraduate Students Who Received Pell Grants
University of California-Berkeley	7,683	35.0 %
Cornell University	2,338	17.2
Columbia University	1,069	17.1
California Institute of Technology	146	16.4
Stanford University	912	14.2
University of Michigan	3,253	14.0
Massachusetts Inst. of Technology	545	13.4
Carnegie Mellon University	677	13.0
Dartmouth College	519	12.8
Emory University	775	12.5
Johns Hopkins University	586	12.3
Brown University	690	12.2
University of Pennsylvania	1,204	12.0
University of Chicago	505	11.9
Rice University	325	11.5
Northwestern University	888	11.3
Duke University	671	10.9
Georgetown University	675	10.7
Vanderbilt University	666	10.7
Yale University	556	10.5
Harvard University	657	9.4
University of Notre Dame	745	9.0
Washington University	525	8.9
University of Virginia	1,131	8.7
Princeton University	373	8.0

HIGH-RANKING LIBERAL ARTS COLLEGES

College	Total Pell Grant Recipients	Percentage of All Undergraduate Students Who Received Pell Grants
Smith College	716	27.1 %
Mount Holyoke College	448	21.4
Wellesley College	395	17.8
Oberlin College	470	16.7
Trinity College	302	15.7
Amherst College	252	15.6
Hamilton College	255	14.4
Bryn Mawr College	184	14.3
Wesleyan University	372	13.8
Claremont McKenna College	156	13.7
Vassar College	321	13.4
Haverford College	149	12.8
Grinnell College	183	12.3
Harvey Mudd College	85	12.1
Swarthmore College	179	12.0
Bowdoin College	193	11.8
Colgate University	303	10.9
Carleton College	208	10.8
Pomona College	161	10.5
Williams College	205	10.3
Bates College	162	9.3
Middlebury College	220	9.2
Colby College	136	7.7
Davidson College	113	6.6
Washington and Lee University	80	4.6

Note: Nationwide, 22.6 percent of all undergraduate students receive federal Pell Grants.

Source: Calculations from Pell Grant data provided to JBHE by the U.S. Department of Education.

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plicit limits on executive authority, it can be said to have granted its consent.

HOW MIGHT ROBERTS view the issue of presidential power? His record in the executive branch is suggestive; Roberts served in President Ronald Reagan's Justice Department and White House, from 1981 to 1986, and as principal deputy solicitor general under President George H.W. Bush, from 1989 to 1993. Because he served at the pleasure of the president for eight years, Roberts may continue to sympathize with presidential claims of authority. "Anyone who has worked in this type of setting starts off with an understanding of the need for a powerful executive that can act efficiently, unilaterally," says H. Jefferson Powell, a Duke Law School professor who worked for the Clinton Justice Department.

Certainly, Roberts's memos from the Reagan era show a young lawyer striving to defend the power of the executive. The memos include a reaction to former Supreme Court Justice Arthur J. Goldberg, who had questioned the president's constitutional authority to send troops to Grenada in 1983 without a declaration of war. "Goldberg is correct that the constitution vests the authority to declare war in the Congress," Roberts wrote. The president, however, "has the inherent authority in the international area to defend American lives and interests," an authority that "has been recognized at least since the time President Jefferson sent Marines to the shores of Tripoli." Another memo concerned the constitutionality of the Immigration Emergency Act, proposed after the Mariel boatlift brought 125,000 Cuban refugees to the United States in 1980. Roberts wrote that the act permitted the president to "flexibly detain illegal immigrants and freely transport them between detention facilities." He acknowledged, "It is a broad grant of emergency powers to the President, but I cannot conclude that it is too broad in light of the Mariel experience." Roberts's vigilance extended beyond presidential emergency powers. For example, when Congress was considering a farm bill in 1983 that would have created a "special assistant to the president for agricultural trade and food aid," Roberts warned of "an unprecedented attempt by the Congress to structure the office of the president."

To be sure, time spent in the executive branch does not necessarily mean Roberts would be sympathetic to executive power as chief justice. Powell says that he left the Justice Department with the belief that "construing statutes in ways that are not intuitively obvious in order to reduce or eliminate their constraint on the president" is not good legal practice. And then there's Robert H. Jackson. As a Supreme Court justice, Jackson denied President Harry S Truman power that he had defended while serving as attorney general for Franklin D. Roosevelt. "[A] judge cannot accept self-serving press statements of the attorney for one of the interested parties as authority in answering a constitutional question, even if the advocate was himself," Jackson wrote in *Youngstown Sheet & Tube* v. *Sawyer*. Ultimately, it is difficult to discern the degree to which Justice Department and White House lawyers are merely defending their executive branch clients. To better anticipate Roberts's tendencies, we must examine other parts of his record.

ONE DOCUMENT OF note is an article by Roberts in the April 1993 issue of the *Duke Law Journal*. Despite its dull title, "ARTICLE III LIMITS ON STATUTORY STANDING," the piece is significant because it was published after Roberts had returned to private practice. Roberts defends the Supreme Court's 1992 decision in *Lujan* v. *Defenders of Wildlife*, which held that, despite a congressional authorization permitting "any person" to bring suit alleging a violation of the Endangered Species Act, the advocacy group lacked the standing to initiate the review of a rule issued by an executive agency. Roberts wrote that the requirement that plaintiffs must themselves have suffered injury "ensures that the court is carrying out *its* function of deciding a case or controversy, rather than fulfilling the *executive*'s responsibility of taking care that the laws be faithfully executed." In other words, a high bar must be met before anyone can question the legality of an executive branch decision. And judicial restraint must be observed so as not to usurp the executive's power. "If we can predict anything from his writings," says DePaul University Law Professor David Franklin, who brought attention to the *Law Journal* article in a *Washington Post* op-ed last month, "it could be that he would side with Scalia in giving the courts, and maybe even Congress, very little say when it comes to the president's power to run the administrative state—and I think that's troubling."

By far, the best evidence of what attitude Roberts would take toward executive authority, if his Supreme Court appointment were to be approved, comes from opinions he signed from the bench of the D.C. Circuit Court of Appeals. Roberts has sat on the Court for the past two years. And, in that time, he has helped deliver three big wins for the Bush administration. The first was last year in *Acree* v. *Republic of Iraq*. The case involved 17 former prisoners of war who wanted to receive compensation from Iraq for torture they endured during the 1991 Gulf war. Two judges dismissed the case on the ground that U.S. antiterrorism law does not permit suits against foreign states, only against an "official, employee, or agent of a foreign state." Roberts concurred but took a different path. He supported the Justice Department's argument that broad language in the 2003 Emergency Wartime Supplemental Appropriations Act had allowed the president to nullify terrorism-related claims against Iraq. "[T]he plaintiffs err in their assumption that the government must somehow prove that Congress intended the statute's broad terms to be construed broadly," Roberts wrote. "The burden is precisely the opposite: the party seeking to narrow the application of the statute must demonstrate that Congress intended something less than what the law on its face says." In a footnote, Roberts added that tra-

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ditional judicial deference to statutory interpretations by executive agencies should also extend to interpretations by the president. The signal to the administration was that, should it ever need support for its conduct, Roberts would be in its corner.

Roberts also sat on the unanimous eight-judge panel that dismissed a suit seeking to force the release of Cheney's energy policy task force records. The panel agreed with the administration that mandating disclosure of internal policy deliberations would hinder candid advice in the future, as well as violate the president's constitutional powers. "Bottom line: this is a significant win for those who believe the presidency needs more power and has lost power over the past 30 years," American University's James A. Thurber, who is writing a book on presidential power, said at the time.

Finally, and most threateningly, Roberts joined the three-judge panel that gave a green light this summer to the military commissions being used to try Guantánamo detainees. These commissions make a mockery of the U.S. justice system. They have an unusually low standard for admissible evidence, allowing hearsay and statements obtained under coercion. They don't require that a detainee be advised of the evidence against him. And they provide no avenue for independent appeal. But the ruling in *Hamdan* v. *Rumsfeld* took a hands-off approach, saying that violations of the Geneva Convention and other treaties are the subject of international negotiations, not lawsuits; that Salim Hamdan and others with links to terrorist organizations are not entitled to prisoner-of-war protection; that Congress effectively, if not explicitly, authorized the military commissions at Guantánamo; and that the Uniform Code of Military Justice, also written by Congress, doesn't regulate those commissions. "No decision, by any court in the wake of the Sept. 11, 2001, attacks, has gone this far," wrote Neal Katyal, a Georgetown University law professor who represented the detainee in question.

BASED ON HIS public record, a Chief Justice Roberts would likely reposition the Court in the direction of unencumbered presidential power. And the nomination of someone like Alberto Gonzales—who, as White House counsel, was accomplice to the Bush administration's power grabs—to the other Court vacancy would exacerbate this tendency even further. Since this administration is unlikely to curb its enthusiasm for power, since Congress is all too reluctant to take on an active role, and since the war on terrorism has no end in sight, the addition of two deferential justices would remove one of the only obstacles between Pennsylvania Avenue and further executive abuses: more kangaroo courts that shame our tradition of justice, more ad hoc policies that supplant settled domestic and international law, and more government secrets that serve political over public interests. We should not allow the seating of Supreme Court justices who would only enable a White House already gone awry. Bush may not have a litmus test. But we ought to. ■

Rebuilding a beautiful mess.

Plus Ca Change

BY CLAY RISEN

THE ONLY THING harder to imagine than rebuilding New Orleans is not rebuilding New Orleans. If the notion of reconstructing vast swaths of a city of 500,000 inhabitants, with all the economic and civic functions that go with it, seems daunting, imagine having to do it from scratch, somewhere else. New Orleans, despite its awful poverty, has one of the most vibrant urban cultures on the planet. And it is one of the world's busiest ports, not only because of its naturally advantageous position at the mouth of the Mississippi but also because, over the last two centuries, the country has spun a tight web of nationally linked infrastructure around the city. None of these attributes can simply be picked up and moved 100 miles away.

So, while a few politicians and pundits—House Speaker Dennis Hastert most famously—have suggested that New Orleans not be rebuilt, the question is really more about how to rebuild and what rebuilding means. Within city-planning literature, the most noted recent, near-total urban rebuilding efforts were in autocratic or semi-autocratic countries: Tangshan, China, wracked by an earthquake in 1976, and Mexico City, also hit by an earthquake in 1985. (The 1995 earthquake in Kobe, Japan, is a noteworthy exception, though even there the Japanese government was able to take liberties with private property rights in its rebuilding that we would never allow in the United States.) But how can a city be rebuilt in a free-market democracy, where the prior demands of property and constantly changing market forces are often at loggerheads with the need for rational urban planning?

The temptation is to call for a robust master plan that drastically restitches the urban fabric. But one need only to look at the post–September 11 efforts at the World Trade Center site to see how quickly planning ideals give way under the pressure of the market. Indeed, according to numerous urban-planning experts, there is always the impetus post-disaster to think big in the hopes that something good can come of something awful. But, they also warn, the results are almost always frustrating. "The record of almost every past precedent is that those who think we can start over again and do some grand plan find themselves frustrated," says Lawrence Vale, head of MIT's Department of Urban Studies and Planning and the co-author of *The Resilient City*. But, if overplanning is a recipe for frustration, doing nothing is a recipe for disaster. "We need to move quickly, but if the planning gets discarded, we will repeat the same mistakes," says Andrew Altman, former head of city planning for Washing-

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ton, D.C., and CEO of Washington's Anacostia waterfront rebuilding initiative. So New Orleans must plan for a better future but do so humbly. The best proposal may be a modest one: a city that is better protected from future floods, a metropolis with upgraded infrastructure and less blight, but one that retains the better aspects of its essential character. New Orleans should not—and will not—become Disney World. But neither can it remain exactly as it was.

THE IMPULSE TO rebuild a radically new city is especially pointed in New Orleans, punctuated as it is by a degraded infrastructure, corrupt politics, massive wealth disparities, and, in many neighborhoods, near–Third World living conditions. After a disaster like Hurricane Katrina, "for the first time, adequate resources become available for thorough physical and design studies," wrote the authors of a 1977 National Science Foundation–funded study on post-disaster reconstruction. "The impossible seems possible ... the opportunity for comprehensive study and major change is at hand."

In fact, the idea of rebuilding a city "bigger and better" has a long—and disheartening—history. After the Great London Fire of 1666, the architect Sir Christopher Wren pushed city leaders to adopt his plan for an ordered city grid, with wide streets that would help slow a future fire. But even the man who built St. Paul's Cathedral had little impact on London's reconstruction. A similar story unfolded after the San Francisco earthquake of 1906, which destroyed over 50 percent of the city's housing stock and wiped out its commercial and industrial sectors. By coincidence, the year before the earthquake, the great architect and urban planner Daniel Burnham had drawn up a master plan for the San Francisco of the twentieth century. But, when the earthquake provided the perfect opportunity to put his plan into effect, it was completely overlooked. Even Chicago, which supposedly rebuilt itself according to exacting new construction codes after a fire wiped out much of its downtown in 1871, was actually first rebuilt in the same shoddy manner as before; it was only after a prolonged political battle that planners put tougher building codes in place.

The crux of the problem, planners admit, is that no city, even one as thoroughly devastated as New Orleans, emerges a tabula rasa. "There is already a plan for reconstruction, indelibly stamped in the perception of each resident—the plan of the pre-disaster city," wrote the authors of the NSF study. Not only does the will of the residents to "make it like it was" render any thought of relocation void, but it also makes it difficult to conceive of any urban design that varies too far from the old model—no matter how socially unjust that model may have been.

Perhaps even more of an obstacle to radical change is the vested interests of the powers that be. Any effort to rebuild a city in a markedly different fashion would inevitably require land redistribution, and, even with just compensation, it's unlikely that wealthy property owners would accept such a deal. After all, this was the essence of the struggle in 2002 and 2003 by some politicians in New York City to wrest control of the World Trade Center site from the Port Authority (PA), which owns the land, and Larry Silverstein, who owns the lease and claims a contractual obligation to rebuild the ten million square feet of office space that existed before September 11. Even a tentative offer by City Hall to swap Ground Zero for the land under the city's two airports, a roughly equal financial trade, did nothing to sway the PA and Silverstein. In the face of catastrophe, those with the most money involved will take the fewest risks.

BUT, EVEN IF big plans make for big failures, cities do in fact get rebuilt. And, if having too many big ideas means few are likely to be implemented, that doesn't mean that a few well-chosen rebuilding principles—and a few well-written rebuilding laws—can't have a decisive impact, laying the groundwork for the eventual, organic emergence of a more just society and more dynamic civic culture.

The first principle in rebuilding New Orleans should be to reduce the risk of future catastrophic flooding. The levee system that Katrina compromised was built to withstand a Category Three hurricane. Given the city's experience with Category Four Katrina, overengineering for a Category Five shouldn't be a question. Many of the most flooded neighborhoods will need to be bulldozed and the ground under them razed. A related idea should be to improve the sustainability of the bayous and barrier islands to the south of New Orleans, which will help sap the power of future hurricanes before they hit the city. And, while the city itself should obviously stay where it is, planners should be willing to consider relocating some of the most flood-prone neighborhoods (which also tend to be the poorest sections of town), perhaps even closing off East New Orleans and Chalmette to future development.

Beyond mere safety, the rebuilding process must inspire public confidence. While New Orleanians will undoubtedly want to return home, many will be hesitant to do so unless they can be assured that there is an unencumbered power structure in place to oversee the city's recovery. In some cases, it might be possible to place such power in the hands of local and state authorities. But New Orleans was, in many ways, a disaster before Katrina, the victim of decades of state neglect and local ineptitude. In this case, only Washington has the wherewithal to oversee the reconstruction. "There's really only one entity who can do that here, given the economic realities, and that's the federal government," says Thomas Campanella, a planning professor at the University of North Carolina, Chapel Hill, and Vale's co-author on *The Resilient City*. "There's going to be some private sector investment in certain areas, but as far as the vast infrastructure and housing for low-income residents, it has to come from the federal government."

But rebuilding physical structures isn't enough—residents need to know that they will have a way to make a living. Any rebuilding efforts should therefore include job prospects as

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well. New Orleans's largest employers, the shipping and tourism industries, won't fully recover for years. Thus, a corollary principle should be to use New Orleans residents as much as possible in the rebuilding effort, on construction crews, and in support staff, even if this requires some job training. This, in turn, will assure the commercial sector that it will have a labor force to draw from when it eventually returns.

Another principle should be to keep as many changes as possible in the background. Toughen up building codes, but in ways that take into account local architectural traditions. Push for more mixed-income neighborhoods, but recognize that residents will revolt if they are forced to move into drastically different living patterns. Push for a city with less corruption and crime, but also recognize that what made New Orleans such an attractive place to live was precisely its down-at-the-heels, not-quite-clean reputation. "I hope we don't end up with a sanitized New Orleans, with the French Quarter and the Garden District and tourist sites surrounded by acres of bulldozed shotgun and camelback houses," says Campanella. "I'm worried that a theme-parking of New Orleans could take place," a result akin to the artificially aged "old town" sections of Cologne, Düsseldorf, and other German cities destroyed during World War II. Such a New Orleans may look more attractive to outsiders, but it will eviscerate the soul of the city.

And, while a strong federal role of unprecedented proportions is clearly necessary, it shouldn't be so large that it chokes off private investment. Oddly enough, it is often immediately after a disaster that a city experiences its greatest growth, not only because it is starting from close to zero but also because the opportunities for investment seem so wide open. Guiding these forces, rather than competing with them, should be at the center of any rebuilding effort.

PERHAPS THE MOST important principle is to respect the persistence of urban memory. A city is not just a collection of streets and buildings; it is a population of individuals who have strong attachments to their ways of life and patterns of living. Places like New Orleans's impoverished Eighth and Ninth Wards "were real and vital places with wonderful social fabrics, where the people had roots that went generations deep," says Campanella. Ignorance of local patterns of life led mid-century planners to tear down inner-city slums and toss residents into soulless projects. Contemporary planners recognize the need to study such patterns and incorporate them into new housing efforts, and the same should be done in New Orleans.

This is not to argue against trying to make the next New Orleans a more equitable place. But it is to say that overly ambitious planners may find their efforts thwarted by the very people they imagine they are helping. Ironically, the same attachments to place and lifestyle that militate so strongly against relocating New Orleans are the exact forces that will stand in the way of any effort to radically refashion the city as well. So the new New Orleans ought to look a lot like the old New Orleans—only better. ■

White House Watch

Storm Surge

BY RYAN LIZZA

DAYS AFTER SEPTEMBER 11, I called some Republicans to ask how the catastrophe had affected President Bush's political standing. Before the attacks, Bush's critics still snickered about his gravitas and questioned his legitimacy. In August 2001, his presidency was adrift, and the talk in Washington was of a political crisis. The terrorist attacks would change all that, and Bush's aides and allies began spinning right away. A senior White House official told me, "What I think most people are seeing around the country for the first time is what most people around the president have always known: that he's a very capable leader." A top Bush adviser insisted, "This has wiped out any notion that this is not a legitimate president. It's just gone."

In other words, the White House immediately grasped the political ramifications of the event. Aides quickly went to work reframing Bush as a war leader, and that strategy rippled outward through the Republican Party. At a Republican National Committee meeting in 2002, Karl Rove famously advised GOP candidates to run on the war. "We can go to the country on this issue," he said, "because they trust the Republican Party to do a better job of protecting and strengthening America's military might and thereby protecting America." Rove's comment still causes blood vessels to bulge in the foreheads of Democrats, but it's hard to argue that he was wrong. Since September 11, Republicans have indeed prospered. Pre–September 11, Democrats narrowly controlled the Senate. Today, Republicans have a ten-seat advantage. Bush turned his half-point popular vote loss to Al Gore in 2000 into a 2.5-point victory over John Kerry in 2004.

This week, in the aftermath of Hurricane Katrina, Democrats are quietly having the same kinds of conversations that those Bush aides had after September 11. If voters turned to Republicans in the wake of a national security crisis, will they turn to Democrats after a humanitarian crisis?

MANY OF THE questions and debates that arose after September 11 played to the GOP's strengths. Republicans were able to politicize votes on Homeland Security legislation, the Iraq war resolution, and military funding bills in ways that made Democrats look weak on national security, helping topple several Senate Democrats and turning Kerry into a walking contradiction. But the Republicans' success wasn't just clever politics. Serious conversations about America's role in the world exposed a stark difference between the two parties. Republicans seemed to be bursting with opinions,

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schools of thought, and lively debates. By contrast, outside of a small Washington-based policy elite, Democrats found that many of their elected officials hadn't spent much time thinking about foreign policy. It was hardly a surprise, then, that Republicans were able to reinforce old party stereotypes. It's not difficult for high-profile politicians to play against type—President Clinton on welfare, Bush on education—but it's hard to change the image of an entire party.

Democrats should hope this is still the case, because the questions raised by the inadequate response to Hurricane Katrina, as well as new topics that will be debated in the storm's wake, play to Democratic strengths. There are two types of issues. The first is ideological. On Capitol Hill, it is now the Democrats who seem confident and bursting with ideas. Senate Minority Leader Harry Reid came back from the August recess with a detailed assistance plan for Gulf Coast evacuees, including tax incentives, housing vouchers, immediate access to Medicaid, and a moratorium on student loan payments. Tapping Democratic policy wonks on the Hill and in the Washington think-tank community, his staff also started to figure out how the government will respond in the coming months and even years. One idea is for an entity similar to the Tennessee Valley Authority to take charge of the rebuilding and infrastructure in the area. "We spent all weekend coming up with a short-term, medium-term, and long-term legislative strategy, as well as an appropriations strategy," says Reid spokesman Jim Manley. Republican leaders came back prepared to repeal the estate tax. They were soon shamed into dropping the idea.

Democrats in Washington seem newly charged with purpose and a sense of mission. Reid's office has become an idea factory. On Wednesday, Howard Dean gave a speech about how Katrina has forced us to face long-neglected problems of race and class. "The truth is," he told the National Baptist Convention of America, "that we have ignored the poor for far too long." Democrats like John Edwards, who have also been trying to highlight poverty in the United States, are now finally getting a hearing. If the White House has an antipoverty initiative, it is a well-kept secret. Before the August recess, the White House cited the passage of its energy plan as a great victory for Bush. The legislation, which doesn't address energy independence or deal seriously with conservation, seems even more hollow than it did before. Finally, the debate over rebuilding New Orleans will focus public attention on the tax and spending priorities of the Bush administration, which Democrats have turned blue talking about for five years, with little political gain to show for it.

There are also characterological issues that may be rethought by voters. To the extent that Bush has been a successful president, his success has rested to a remarkable degree on his personal character. His campaign slogan last year might as well have been, "Even though you don't think I'm doing a good job, you can trust me." Bush aides call this leadership—getting people to support you even though they disagree. Instead of character or leadership, Democrats like to offer competence. (Clinton's slogan could have been, "Even though you don't trust me, you know I'm doing a good job.") Democrats, who see before them the most incompetent presidency of their lifetimes, were mystified as to why the competence Kerry offered last year wasn't enough. Early polls don't show universal hostility toward Bush's incompetent handling of the disaster. But, more importantly, the polls don't show the country rallying to Bush's side, as almost always happens after such a disaster. Perhaps Katrina is the sort of catastrophe that could tip the political balance back in favor of competence rather than character.

TO BE SURE, there are important differences between the post–September 11 political environment and the post-Katrina one. Democrats are, at the moment, leaderless. There are few Democrats who command enough attention to make the party's case to the country. Much of the GOP's post–September 11 success, especially the victories in the 2002 midterm elections, were a direct result of Bush's popularity and his cross-country stumping for Republican candidates. There is no similar figure to energize the Democratic Party. Furthermore, although Democrats can—and presumably will—mine the Congressional Record for Republicans' votes against newly relevant priorities, such as money for FEMA and infrastructure needs, they don't have the power to force Republicans into politically damaging votes the way the GOP did when, for example, it baited the homeland security bill with anti-union provisions to prevent Democrats from supporting it. What they do have is an issue that allows them to show voters what they stand for, and this could make Katrina the Democratic September 11. ■

Mike Brown's padded resumé.

Legal Brief

BY PAUL CAMPOS

BY NOW, THE basic contours of Mike Brown's ascendancy to director of the Federal Emergency Management Agency (FEMA) have come to light. Journalists have uncovered that Brown had almost no relevant experience for the position and got hired by FEMA because he was a longtime friend of George W. Bush's close associate Joe Allbaugh. The story being reported, in other words, is that Brown was a lawyer who ended up with a crucial post in the Bush administration because of rank cronyism.

This is a well-known Washington narrative: hotshot lawyer gets appointed to a high government office despite lacking the expertise someone in the position ought to possess. For example, on September 6, *The Washington Post* fit the

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Brown scandal into this narrative in a front-page story, saying that Brown has been "caricatured as the failed head of an Arabian horse sporting group who was plucked from obscurity to become President Bush's point man for the worst natural disaster in U.S. history."

Yet, far from being a caricature, this description, if anything, understates the absurdity of the situation. The real story of Brown's meteoric rise from obscurity is far more disturbing, as well as a good deal more farcical. It's clear that hiring Brown to run FEMA was an act of gross recklessness, given his utter lack of qualifications for the job. What's less clear is the answer to the question of exactly what, given Brown's real biography, he *is* qualified to do.

TO UNDERSTAND THE Mike Brown saga, one has to know something about the intricacies of the legal profession, beginning with the status of the law school he attended. Brown's biography on FEMA's website reports that he's a graduate of the Oklahoma City University School of Law. This is not, to put it charitably, a well-known institution. For example, I've been a law professor for the past 15 years and have never heard of it. Of more relevance is the fact that, until 2003, the school was not even a member of the Association of American Law Schools (AALS)—the organization that, along with the American Bar Association, accredits the nation's law schools. Most prospective law students won't even consider applying to a non-AALS law school unless they have no other option, because many employers have a policy of not considering graduates of non-AALS institutions. So it's fair to say that Brown embarked on his prospective legal career from the bottom of the profession's hierarchy.

So what did Brown, who received his J.D. in 1981, do with his non-AALS law degree? In 1985, Brown joined the firm of Long, Ford, Lester & Brown in Enid, Oklahoma. When I spoke to one of its former members, Andrew Lester (the firm no longer exists), he recalled that Brown was with the firm for only "about 18 months." Lester, who is a longtime friend of Brown, believes that Brown spent most of his time in the first few years after law school pursuing his own legal practice and representing the interests of a prominent local family. Lester vigorously defended his friend's overall abilities, as well as his qualifications for the FEMA directorship, pointing out that FEMA had dealt with more than 100 federal emergencies during Brown's tenure. In any case, despite the claim of Brown's FEMA biography that he practiced law for 20 years prior to his 2001 appointment as FEMA's general counsel, it appears that, by 1987, he had already more or less abandoned his nascent legal career. From 1987 to 1990, Brown's resumé includes being the sacrificial lamb for the Oklahoma Republican Party in a 1988 congressional election, in which he won 27 percent of the vote against the incumbent Democrat, and stints as an assistant city manager and city councilman in Edmond, Oklahoma. (According to FEMA, because of these positions, "Mike Brown has a lot of experience managing people.") By 1991, he had moved to Colorado, where he became commissioner of judges and stewards for the International Arabian Horse Association (IAHA). This position, which never made his FEMA bio, was Brown's full-time job from 1991 to 2001, and it had nothing to do with the practice of law.

Brown's job was to make sure that horse show judges followed the rules, and his enthusiasm for their strict enforcement won him the nickname of "the czar," as well as the enmity of contestants, some of whom sued the Association, as well as Brown himself. According to a September 6 *Denver Post* article, Brown became embroiled in controversy when allegations were made that, to help pay his legal fees, Brown solicited a nearly $50,000 contribution from an IAHA member whose conduct he was supposed to regulate. Lester, who represented Brown in the IAHA's suits, told me that this was a misunderstanding, due in part to the IAHA's initial unwillingness to fulfill its contractual obligation to cover Brown's legal costs. "People are focusing on these attacks made against him when he was with the IAHA," Lester says, rather than looking at the work that Brown had actually done at FEMA. Brown resigned from his position in 2001 under pressure, and the IAHA was reorganized as the Arabian Horse Association.

What, then, are we to make of the claim in Brown's FEMA biography that, prior to joining the Agency, he had spent most of his professional career practicing law in Colorado? Normally, an attorney practicing law in a state for ten years would have left a record of his experience in public documents. But just about the only evidence of Brown's Colorado legal career is the Web page he submitted to *Findlaw.com*, an Internet site for people seeking legal representation. There, he lists himself as a member of the "International Arabian Horse Association Legal Dept." and claims to be competent to practice law across a dizzying spectrum of specialties—estate planning, family law, employment law for both plaintiffs and defendants, real-estate law, sports law, labor law, and legislative practice. With all this expertise, it's all the more striking that one can't find any other evidence of Brown's legal career in Colorado.

So what legal work did Mike Brown perform before his stunning reversal of fortune? According to his FEMA biography, "[H]e served as a bar examiner on ethics and professional responsibility for the Oklahoma Supreme Court and as a hearing examiner for the Colorado Supreme Court." Translation: In Oklahoma, he graded answers to bar exam questions, and, in Colorado, he volunteered to serve on the local attorney disciplinary board.

When Brown left the IAHA four years ago, he was, among other things, a failed former lawyer—a man with a 20-year-old degree from a semi-accredited law school who hadn't attempted to practice law in a serious way in nearly 15 years and who had just been forced out of his job in the wake of charges of impropriety. At this point in his life, returning to his long-abandoned legal career would have been very difficult in the competitive Colorado legal market. Yet, within

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months of leaving the IAHA, he was handed one of the top legal positions in the entire federal government: general counsel for a major federal agency. A year later, he was made its number-two official, and, a year after that, Bush appointed him director of FEMA.

It's bad enough when attorneys are named to government jobs for which their careers, no matter how distinguished, don't qualify them. But Brown wasn't a distinguished lawyer: He was hardly a lawyer at all. When he left the IAHA, he was a 47-year-old with a very thin resumé and no job. Yet he was also what's known in the Mafia as a "connected guy." That such a person could end up in one of the federal government's most important positions tells you all you need to know about how the Bush administration works—or, rather, doesn't. ■

With Katrina, the Pentagon failed.

Indefensible

BY SPENCER ACKERMAN

IN THE WAKE of the annihilation and social discontent left by Hurricane Katrina, it might be unseemly for anyone to rack up I-told-you-so's. But, even if he's not saying it, Jim Carafano told you so. Carafano, one of the nation's premier homeland security experts, has spent the past four years urging a greater organizational and operational focus on disaster relief and casting a skeptical glance at official promises that the nation is prepared for a catastrophic emergency. From his perch at the Heritage Foundation, and before that at the Center on Strategic and Budgetary Assessments, he has been a relentless advocate for the idea that the Pentagon in particular needs to clarify what its homeland security mission actually is. Over in the E Ring, Carafano's warnings—that Northern Command (NORTHCOM), the new regional command established to provide military assistance in the event of a domestic disaster, needs its own troops and equipment and that the National Guard needs precise guidelines on its homeland security role—carry at least some weight. When the Pentagon was about to unveil its homeland security strategy in June, it sent Paul McHale, the assistant secretary for homeland defense, to a Carafano-convened panel at Heritage for a preview and Q&A.

Unfortunately, what Katrina shows is that, four years after September 11, the Pentagon's homeland security apparatus still possesses more Qs than As. National Guardsmen, under the command of Louisiana Governor Kathleen Blanco, didn't reach New Orleans until Friday. NORTHCOM established a joint task force to facilitate help, but many of the ships it ordered to the Gulf Coast just reached the area this week. It's true that the Defense Department doesn't bear the lion's share of the blame for the disastrously shiftless response to the hurricane: Its domestic operations, justifiably constrained to limit the use of the military in the United States, support state governors and the Department of Homeland Security, which spectacularly failed its first major post–September 11 test last week. But its uncertain response to Katrina underscores Carafano's long-standing concern that homeland security still isn't the priority in the Pentagon that it needs to be.

SEPTEMBER 11 PROVED that, after a successful terrorist attack, the capacities of civilian first responders like firefighters and police are quickly exceeded. In recognition, the Pentagon created NORTHCOM in 2002. Its role was to provide a clear chain of command and operational planning to deploy military assistance after another disaster. The next year, it finished establishing a new senior directorate in the Office of the Secretary of Defense to oversee overall Pentagon contributions to the government's newly reorganized homeland security efforts. In practically every statement about how seriously the Pentagon took its mission to protect the continental United States, Donald Rumsfeld and his aides praised the reorganizations, promising, as Paul Wolfowitz did in 2002, that "defense of the U.S. homeland has been the top priority of the Department of Defense."

But, in practice, the Pentagon didn't seem to prioritize potential domestic missions. NORTHCOM, for example, was given responsibility for directing military operations in the event of a domestic disaster but was not given command over any troops and hardware for its immediate use. In the case of the National Guard, there was no consensus on whether it should emphasize its war-fighting role abroad or its disaster-mitigation functions at home. The Pentagon's answer has been that the Guard can do both without overextending itself. This assurance appears less and less compelling after Katrina. As *The Wall Street Journal* has reported, Louisiana Guard commanders leaving for Iraq last October took with them high-water vehicles and other equipment that would be needed to deal with the hurricane.

Most troubling of all was the Pentagon's overall reluctance to be a domestic crisis-response crew when it could engage in military operations overseas. When I interviewed McHale in 2003, he downplayed the Pentagon's role in mitigating a domestic disaster. "We should not move [our focus] over to consequence-management too quickly," he told me, arguing that "if all we do is get better and better at cleaning up after a successful enemy attack, we will have failed in our mission." He didn't get very specific, and it took another two years for McHale to issue a Defense Department strategy for homeland security. When McHale described his approach at Heritage in June, he reemphasized the principle that homeland security begins abroad, waxing enthusiastic about creating what he has called a "maritime

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defense in depth"—essentially a naval capacity to interdict illicit shipments of weapons of mass destruction far from U.S. shores. The goal of mitigating the effects of what would happen if a nuclear device slipped past the Navy was granted much less emphasis, despite worries among experts about NORTHCOM not having units immediately available for disaster-relief missions. Carafano, in particular, urged the creation of precisely such a capability. "We may only use them once in 100 years," he told *Congressional Quarterly* in 2003, but, "when we need them, they'd be there."

Katrina, whose effects Homeland Security Secretary Michael Chertoff described over the weekend as similar to "if an atomic bomb was dropped," showed that Carafano was right. On August 27, two days before the hurricane touched down, Blanco sent a request to President Bush for federal assistance, warning that "this incident is of such severity and magnitude that effective response is beyond the capabilities of the State and affected local governments." For reasons that will probably only become clear after the anticipated White House and congressional investigations, requests from the Federal Emergency Management Agency for NORTHCOM's help "did not come our way," as Major General Richard Rowe of NORTHCOM told *The Washington Post*. According to Lieutenant General Russel Honoré, the crusty commander of NORTHCOM's Joint Task Force Katrina (dubbed a "John Wayne dude" by New Orleans Mayor Ray Nagin), his command was established on Sunday, August 28, a day before the storm hit.

Although NORTHCOM may not be to blame for its soldiers' tardy appearance on the scene, the Pentagon bears responsibility for at least one fundamental problem: NORTHCOM's lack of immediately deployable military assets. By Thursday, when Honoré briefed Pentagon reporters on his efforts, JTF Katrina's initial contribution of about eight naval ships and 50 helicopters had yet to arrive, nor had the hospital ship *Comfort* left its Baltimore port. While other regional commands typically have deployable military units designated to them, Honoré had to tell reporters on Thursday that "we have two LCACs [landing craft air cushioned], naval assault vehicles, coming in. We'll put those in the littorals around New Orleans to help resupply and to move people within the next twelve hours." It's possible that this delay could have happened under any regional command, but, considering that Honoré described his priority mission as "search and rescue"—which is inherently a race against time—this appears to be a serious NORTHCOM flaw. Indeed, according to the *Journal*, the Army didn't want to send soldiers from the 10th Mountain Division in Fort Polk for the NORTHCOM mission in nearby New Orleans, since the division is preparing to return to Afghanistan. (Concerns about overextending the division apparently led to the few 10th Mountain soldiers who ultimately joined JTF Katrina to receive their deployment orders only on Saturday afternoon.)

For its part, the National Guard—which began sweeping into New Orleans on Friday and earned well-deserved accolades for its professionalism in evacuating the Superdome and Convention Center and restoring order to the city—had a few flaws of its own. On Saturday, Lieutenant General H. Steven Blum, briefing reporters about the first wave of Guard deployment, confessed that the Guard simply didn't have the strength to enter the city earlier. "We waited until we had enough force in place to do an overwhelming force," he said. "Some people asked why didn't we go in sooner. Had we gone in with less force, it may have been challenged, innocents may have been caught in a fight between the Guard military police and those who did not want to be processed or apprehended, and we would put innocents' lives at risk."

Blum insisted that the week it took to convene the relatively small force of 7,000 Guardsmen, who eventually entered New Orleans on Saturday, had nothing to do with the Guard's duties in Iraq and Afghanistan. But reporters were stunned to hear that the Guard required so long to amass these troops. When one journalist asked "why it took several days to get to this point," Blum replied, "The delay was in—if you want to call it a delay. I really don't call it a delay, I'll be honest about that. ... The real issue, particularly in New Orleans, is that no one anticipated the disintegration or the erosion of the civilian police force in New Orleans." No one, that is, except the millions of Americans watching the helplessness of the police on television as early as Wednesday, after the city flooded. Or anyone who read the Department of Homeland Security's December 2004 National Response Plan, which warns that a disaster like Katrina "almost immediately exceeds resources normally available to State, local, tribal, and private-sector authorities in the impacted area."

What's more, in at least some cases, a lack of coordination between NORTHCOM and the Guard hampered the relief effort. Colonel Roy Nomey of the Louisiana National Guard's 256th Infantry Brigade eagerly awaited the arrival of JTF Katrina's additional vehicles for his food-distribution mission, since his 300 men (the remaining 3,700 troops in his brigade are in Iraq) didn't have sufficient equipment to get them to New Orleanians in need. "My people are ready. We're poised around New Orleans to set up food distribution centers, but we don't have enough vehicles that sit high enough to get through the flooded streets," Nomey told *The Dallas Morning News* on Wednesday. Meanwhile, food was scarce at the Superdome and the Convention Center, where thousands of helpless, mostly poor New Orleanians wondered when help would arrive. As Carafano laments, "The [Pentagon] system that we have worked as it was designed. It was never designed to get masses of aid into place in 24 hours. And that's the problem."

IT'S DIFFICULT TO say why exactly homeland security hasn't been a top Pentagon priority. Certainly the fact that the military has to simultaneously prosecute two manpower-intensive wars in Iraq and Afghanistan provides part of the answer. Another part may be a disinclination to emphasize domestic operations where the

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military can't play a lead role: Laws like the 1878 Posse Comitatus Act justifiably restrict the use of the military in the United States itself. But surely another piece of the answer has to do with a deeper-seated reluctance to take on what's known inside the Pentagon as "operations other than war." As a Defense official once groused to *CQ*, "We can't be looked on as the be-all and end-all panacea for homeland security." The official may have a point, but Katrina proves that, when a mass-casualty disaster hits U.S. shores, the military is practically the only institution that can provide rapid and sustained relief. Jim Carafano could have told him that. Come to think of it, he did. ■

Katrina stalls Detroit.

Car Crash

BY GREGG EASTERBROOK

ALTHOUGH OFFICIALS HAD long known disaster could happen, they took no action. They ignored warnings from environmentalists, engineers, and analysts. Somber reports foreshadowing the possible calamity were quietly filed away. In public, officials maintained that everything was fine—until disaster struck and it became obvious to all that everything was *not* fine, and might never be so again. New Orleans? I'm talking about Detroit.

New Orleans, Gulfport, and other cities ravaged by Hurricane Katrina have sustained horrible damage. But, with the help of insurers and federal taxpayers, they will recover—at least economically. The Big Three automakers, on the other hand, face a more enduring problem: high gas prices. Despite decades of warnings that low pump prices could not last forever, General Motors, Ford, and Chrysler still base their sales strategies on hawking big, heavy vehicles with high-horsepower engines to customers who, until recently, never looked at the mileage sticker on the window. In August, pump prices averaging $2.61 per gallon had already caused Big Three sales to falter. Now Katrina's damage to refineries and offshore oil platforms has driven prices north of $3.00. Once production is restored, gas may become somewhat less expensive—but not low enough to stave off what should have been clear before Katrina announced it with Category Four destruction: The era of cheap gas is over and, with it, the way Detroit does business.

DETROIT AUTOMAKERS ARE in no way, shape, or form prepared for the end of cheap fuel. With Congress long refusing to raise auto fuel-economy standards and White Houses of both parties repeatedly assuring automakers that Washington would do almost anything to keep inexpensive gasoline flowing, GM, Ford, and the Chrysler side of Daimler-Chrysler have simply refused to deal with the fact that, someday, a perfect storm could strike petroleum markets. In recent years, the Big Three have sold more SUVs and pickup trucks than regular cars. All three now earn most of their manufacturing profits from big-vehicle sales; big SUVs are decked out as luxo land yachts that sell, on average, for more than $35,000. Moreover, the Big Three have oriented much of their capital planning around the assumption that they will be able to sell such vehicles indefinitely. Three years ago, when the Hummer was new and selling like hotcakes, GM invested billions, and required major investments by auto dealers, to set up a separate Hummer sales division with expensive macho décor showrooms to appeal to people with the Hummer personality defect. GM also dedicated substantial resources to a new generation of large SUVs, which are scheduled to reach showrooms next year. Ford and Chrysler have more big vehicles in development as well.

Even before Katrina hit, the flaws in this strategy were becoming apparent this summer, as gas prices surged. GM saw a 16 percent decline in August 2005 sales compared with August 2004, with sales of the company's big SUVs—the Hummer, Yukon, and Suburban—off by 20 percent. The entire Hummer product line may soon be history and the investment wasted. (Future collectors of amusing oddities from the twenty-first century will surely want to have one of the Hummer-branded laptop computers General Motors unveiled last week. It is available in bright yellow and, just like its namesake, wildly overpriced at $2,988.) Although Ford and Chrysler sales were up in August (after they matched discounts GM began offering in June), sales of the companies' large vehicles—the Ford Expedition and Explorer, and the Dodge Durango—were down. Almost inevitably, this drop in SUV sales will mean a drop in profits. Most analysts estimate that GM, Ford, and Chrysler earn several thousand dollars per large SUV and large pickup sold, while making slim if any profit on regular cars. If the market for big, heavy vehicles crashes, Detroit's earnings may be troubled for a long time—and Detroit's earnings were under pressure even before gasoline prices began to rise. Already this year, GM announced it would eliminate 25,000 jobs and close several North American plants.

Katrina has highlighted and perhaps accelerated the contraction of the U.S. auto industry. It is impossible to project what will happen to gasoline prices once production from offshore oil platforms in the Gulf of Mexico is restored, but it is hard to foresee any force that will drive prices down to the levels Americans have grown accustomed to in years past. The global supply of petroleum remains tight, and global demand keeps rising—sharply in China and India. Opening new oil fields, including perhaps in the Arctic National Wildlife Refuge, is expected only to replace supply from depleting existing fields, not result in the discovery of new "elephant" oil deposits that significantly increase global supplies

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and thus lower prices. Even once Gulf petroleum production has been restored, gas that costs $3 per gallon or more may be here to stay. Who's going to want a Hummer (twelve miles per gallon) or a Ford F-150 pickup with the V8 option (14 MPG) if each tankful costs $78? They might as well have filled the levee breaches in New Orleans with Hummers.

THE BIG THREE have taken steps to revitalize their sales of cars with decent MPG. GM's new Malibu and Ford's new Five Hundred are snazzy sedans that get good mileage: Both offer strong competition to the Toyota Camry and Honda Accord, the industry leaders in the regular-car category. But most high-mileage GM and Ford products are either econobox deathtraps or, like the Chevy Monte Carlo, seriously out of date: It's obvious that the companies put their best efforts into their SUVs and pickup trucks. Chrysler is in better financial condition than its Detroit rivals partly because the company hit three consecutive home runs with introductions of regular cars—the classy 300C sedan, the clever Magnum sports wagon, and the spiffy new Charger, a retro muscle car. All are selling briskly, but the versions of these cars that have been selling are the high-horsepower models with powerful HEMI engines. These models are likely to become less attractive as fuel prices rise. The HEMI-equipped Charger gets 17 MPG in the city, which is pathetic for a sedan. Its tank holds 19 gallons. At $3 per gallon, you'll spend $57 for a fill-up, and, at 17 MPG, you'll be stopping for a fill-up often.

Might Detroit save itself by selling high-mileage gasoline-electric hybrids? Demand for hybrids seems likely to keep rising, and the Big Three have some attractive offerings in this category, including Ford's 33 MPG Escape hybrid-powered SUV. The trouble is that, while hybrids are easy on fuel, selling more of them would spell financial ruin for the automakers. Right now the hardest car to get in the United States is the very high-mileage Toyota Prius hybrid—there's often a wait to buy one. Yet Toyota has only gradually increased production, because the company loses money on Prius sales. Ford is only making a few Escape hybrids, because each one that rolls through the door represents a loss for Ford. Automakers have not yet figured out how to mass-manufacture hybrids cheaply; money-losers, hybrids are being sold mainly as an experiment. Perhaps there will be breakthroughs that allow the profitable manufacturing of hybrid vehicles: This would dramatically improve the outlook for Detroit, while reducing U.S. dependence on Middle Eastern oil and leading to lower greenhouse gas emissions. But, for the next few years at minimum, automakers' survival depends on conventional vehicles.

New Orleans will be rebuilt; the offshore oil platforms will pump anew; the Mississippi will pulse with shipping barges and casinos once more. It may take a surprisingly short time for the Gulf region to rebound. The lasting economic damage from Katrina may be felt most keenly by the U.S. auto industry. And, just like the officials who did nothing about the levees, Detroit was repeatedly warned. ■

Plaquemines Dispatch

Wasteland

BY CLAY RISEN

CAPTAIN TY WILTZ normally oversees the narcotics division of the Plaquemines Parish Sheriff's Office. But, since Katrina hit, he has been leading a search and rescue team deep into the parish bayou, which begins just south of New Orleans and runs nearly 100 miles to the Gulf of Mexico. "It's a far cry different than searching for dope," he says as the team sets out early Tuesday morning from Belle Chasse High School, which has been turned into a makeshift base for the sheriff's department and a contingent of soldiers from the New Mexico National Guard.

While national attention has been focused on the fate of New Orleans, it's really places like Plaquemines Parish that are likely to vanish from the map. There's little doubt that the Big Easy, with some of its neighborhoods and infrastructure still intact, will be rebuilt. The same doesn't go for Plaquemines, a sparsely populated—with 845 square miles, it has only 28,000 inhabitants—but tightly knit swath of towns. "Ninety-nine percent of these people are related," Wiltz says of the residents of one particular town. Although most of them were lucky enough to leave before the hurricane, given the extent of the devastation, they are unlikely to return. The storm's environmental impact affects their lives on the basest economic levels. Many of the locals work as fishermen, but now the Mississippi and its bywaters are so polluted that some say it will be years before any wide-scale fishing can resume. Almost all of Wiltz's five officers, who lived in the parish's isolated settlements, lost their homes, and they all say they will move away. Wiltz says the federal government will likely buy a lot of the land, and its residents will join the diaspora currently underway, relocating to other parts of southern Louisiana or even out of the state.

Wiltz is short and stocky, with close-cropped strawberry blond hair and a commanding voice. On patrol, he wears white rubber boots, a yellow straw hat, a shotgun slung over his shoulder, and a pistol holstered to his belt. He twirls an iron rod, which he uses to knock in windows and pry open doors. He hops into the passenger seat of a white county coroner's van and tells the driver to head south on a state highway that runs along the Mississippi. Two transport trucks and a school bus filled with National Guardsmen, plus two cars of sheriff deputies, follow behind.

Soon the industrial suburbs that make up Plaquemines's northern corner recede, and we enter the areas hardest hit by Katrina. It's easy to see why people don't imagine themselves coming back. Caskets, lifted by the storm surge from

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their graves, litter the highway. Dead animals—cows, elk, dogs—lie by the side of the road, rotting in the hot sun. Birds circle overhead. "When they did a flyover just after the storm, they saw these animals and thought they were dead bodies," Wiltz says. Huge barges sit perfectly arranged atop levees, where the water's surge had deposited them. "Three days ago, this was totally flooded," he says, adding that, until a few days ago, the searches had to be conducted by boat. "The only way to navigate was by going from telephone pole to telephone pole." The grass along the road is covered in a thin film of dried ooze, and the air is thick with the putrid odor of decaying fish and raw sewage. Every once in a while, a truck from one of the many oil companies located in Plaquemines drives by. Otherwise, the bayou is empty.

So far they have rescued 53 people, Wiltz says, though they have also found three bodies. Nevertheless, each house has to be searched and marked with spray paint—a green circle means it is empty, a red circle means it contains a body. "Let's use up all this green paint," says one of Wiltz's men as they head into the first group of houses, a knot of single-wide trailers lodged between the highway and the levee. They shout, "Sheriff's Department!" as they pry open the trailer-home doors and comb through the wreckage inside. While they work, the men talk about their overturned lives in matter-of-fact tones. "My kids are in Baton Rouge, and they start school today," says Wiltz. "Have you seen my house?" asks one of his deputies. "All I've got is the frame from my garage door, and the roof's on [Highway] 23. Romy Treadway's house is in a tree." After 20 minutes, the houses are all circled in green, and they move on.

The search column inches down the highway and back roads, stopping every half-mile at a new cluster of homes and, in one case, a small Catholic church. The chapel is calf-deep in mud and twigs; the communion dais has been swept from the front of the sanctuary and now sits on the back pews, topped by a Virgin Mary statue on its side. Wiltz, who worked in his family's auto-parts store before joining the department, started out patrolling tiny Diamond, Louisiana, just south of the church. "Diamond's gone," he says. "It's all wiped out."

Like Diamond, many of the towns in Plaquemines Parish will likely cease to be, their residents surrendering their homes—and even family pets—to nature. Loud bangs occasionally ring out, as Wiltz and others shoot dogs they find among the houses, scared, sunburned, and dehydrated. "I had to put him out of his misery," Wiltz explains remorsefully, after shooting a dachshund. Wiltz is also thinking of his men—he has already seen dogs roaming in packs, and he is worried that they might attack.

We stop for lunch along the highway: MREs and bottled water. Some of Wiltz's men have already gone ahead, perhaps anxious to see more of the parish where most of them have spent their entire lives. The plan had been to clear houses until 3 p.m., but Wiltz announces that he has decided to call it a day. "We've run out of green paint," he says. ■

Baton Rouge Dispatch

Gulf Stream

BY JASON ZENGERLE

On Monday morning in Baton Rouge, Josephine Bell was trying to tidy her family's living area. "Help me sweep up now!" she yelled at one of her sons, handing him a broom and pointing to a pile of spilled cereal beneath a cot. "I want this area clean!"

Bell, her husband, and her two sons had arrived in Baton Rouge eight days earlier, when, heeding the call to evacuate New Orleans as Hurricane Katrina approached, they left their home in the city's Uptown neighborhood and headed, on a special bus, 80 miles west on I-10. Now, along with more than 5,000 other refugees—almost all of them like Bell: poor, black, and from New Orleans—she was living in the River Center convention hall. Her family's new home consisted of four cots pushed together on a few square feet of concrete floor inside the huge, hangar-like space. "We've got air conditioning, lights, running water; we can't complain," she said, holding up her broom and twirling it around. "But it's hard to keep clean because of the kids."

Bell and the hundreds of thousands of others displaced from their homes by Katrina are hardly the first diaspora in U.S. history. Seventy years ago, several hundred thousand people in the Great Plains lost their farms in the drought and moved to California, where they were able to find work as crop pickers. Around the same time, more than one million blacks were moving from the rural South to the urban North to take jobs in factories and on railroads. But the Okies and the Arkies of the Dust Bowl and the Southern blacks of the Great Migration resettled over the course of many years. The members of the Katrina diaspora are being forced to resettle virtually overnight. This massive group of suddenly displaced persons is unique in U.S. history. And, while national attention is still focused on the horrors they faced during and immediately after the storm, it's the days ahead—as they fan out across the country and start lives anew—that may prove to be some of their most challenging.

For many families like Josephine Bell's, there is no going home again. When Bell lived in New Orleans, she worked as a food server at Harrah's casino, but, with the casino now closed for the foreseeable future, her job has essentially disappeared. Still, even if Bell had a job in New Orleans to go back to, she would not want to return to the city. "With all the dead bodies and disease," Bell said, "who wants to go back to get sick?" Instead, Bell

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had another plan. "We know what we're going to do," she said, lightly stomping her slipper-clad foot. "We're going to relocate here to Baton Rouge."

Bell's decision to settle in Baton Rouge wasn't based on having spent a lot of time in the city over the past few days. The River Center shelter may be in Baton Rouge—located in the heart of its downtown, along the Mississippi River—but it is certainly not *of* it. Access in and out of the shelter is controlled by armed guards, and the facility is locked down from 10 p.m. until 7 a.m. And, while River Center residents are free to venture outside the building during the day, the Red Cross, which runs the shelter, gives them little incentive to do so. Three meals are provided inside the River Center each day and donated clothes and toys are handed out twice daily. The shelter has an on-site medical clinic and pharmacy, plus a counseling center. It screens movies for children, and there are televisions set up in the exhibition hall for the adults.

Life in this bubble has insulated the refugees from a less pleasant reality: Their presence has made many Baton Rouge residents uneasy. Since the mass exodus from New Orleans, the Baton Rouge area has seen its population skyrocket from 413,000 to, according to some estimates, 700,000—suddenly transforming the typically sleepy state capital and university town into Louisiana's biggest and most bustling city. Baton Rouge residents complain about the traffic and about car trips that used to take ten minutes now taking more than an hour. And they fret about real estate prices skyrocketing, as so many businesses flooded out of New Orleans are choosing to relocate in Baton Rouge.

More than anything else, though, Baton Rouge residents worry about the social impact the refugees from New Orleans, which is about 70 percent black, will have on their city, where blacks make up only about half the population. Standing outside a Wal-Mart on the southern side of town, Kathy Ademek, a white woman who has lived in Baton Rouge for 30 years, said that she was most concerned about public safety. "I've had friends tell me that when they stop at red lights, people try to pull them out of their cars," she said. "I see them on the street corners, and they're there all night long, just groups of them. I'm not letting my teenagers drive at night." These rumors and fears have led to a run on handguns and tear gas at some Baton Rouge stores. And even Baton Rouge's mayor (who himself is black) has declared that he won't tolerate "lawlessness" from the New Orleans refugees. The River Center, as Baton Rouge's largest Katrina shelter, seems to have become a flashpoint for these concerns.

Out on the convention hall floor, amid the sea of blankets and cots, many voiced sentiments similar to Bell's: a desire never to return to New Orleans and a hope of settling in Baton Rouge. But that may be a difficult dream to achieve, because the most readily available resettlement opportunities for the Katrina diaspora appear to exist elsewhere.

Out in the River Center's lobby, tacked to an information board, there were numerous notices offering the refugees new lives in faraway places. SPACE TO HOUSE 6 FAMILIES WITH UP TO 6 PEOPLE EACH. IN SOUTH DAKOTA, said one. COLUMBUS, OHIO. WE HAVE FURNISHED APARTMENTS (FREE/YEAR) AND JOBS FOR FAMILIES INTERESTED IN RELOCATING. CALL DAVE, advertised another. And, every few hours, an announcement was made over the public address system that a bus bound for a distant city—like Indianapolis, Indiana, or Lansing, Michigan, or Helena, Montana, where jobs would be lined up and housing would be provided—was at the River Center getting ready to roll out. Sometimes, those in the shelter had less than an hour to decide whether they wanted to get on the bus.

In theory, the opportunity to start life over in a new place with a clean slate would seem to be part of the American dream, particularly for people who, even before their current plight, lived lives filled with hardships. But what's romantic in the abstract is far more frightening in reality, and, so far, few River Center refugees have availed themselves of that opportunity. The bus that went to Lansing wound up with only one passenger.

Gradually, though, some are realizing that staying put may be impossible. Shabby Brown, a 20-year-old man from just outside of New Orleans, said that his mother was out looking for a job in Baton Rouge. "Every morning, she goes out and tries to find work," he said. "She hasn't found it yet."

And, as experiences like that become more common, some members of the Katrina diaspora are becoming less resistant to the idea of starting over outside Louisiana. Not far from where a small group was huddled around a television watching Bill Clinton talk about the crisis of displaced persons, a soft-spoken man named Charles Robinson walked up to a table where a Red Cross volunteer was helping people with relocating. "Where are you willing to go?" the Red Cross volunteer asked.

Robinson had lived in New Orleans for all of his 36 years, and, when evacuating to Baton Rouge the previous Saturday, he had fully intended to return to the city of his birth or, at the very least, stay close by. But now he was looking to expand his options. "Anywhere that's not cold," Robinson replied. "I'd like to go to Houston, Texas."

The volunteer told him there was a bus leaving for Houston later that day but that, when he got there, he would be responsible for finding a job and a place to live. Robinson said he thought he could get a job—in New Orleans he had worked as a stock clerk for Lowe's, and he had been told he would be hired at any of the company's stores—but that he would need help finding a home. He put his name on a list for refugees seeking housing opportunities in Houston, and the volunteer said she would let him know if anything came up.

Robinson slumped away from the table and headed back to his cot. "I'll go anywhere where it's not cold," he said again. "I don't have anywhere to go back to." ■

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BOOKS & THE ARTS

STANLEY KAUFFMANN ON FILMS

Heights and Depths

A FRIEND OF MINE WAS A network correspondent during the Nixon-McGovern presidential campaign in 1972, and was assigned to the Nixon campaign train. At one point the train stopped overnight at Pennsylvania Station in New York, and my friend took me on board to have a look. He introduced me to two other correspondents. We talked about Nixon whom, pre-Watergate, I already loathed, and I was pleasantly surprised to hear that they agreed with me. Then each of them turned over the lapel of his jacket and showed me a McGovern button.

ONE BRIGHT SHINING MOMENT
(First Run)

KEANE
(Magnolia)

I hoped that this incident was a prediction, that McGovern would prove to be the quiet favorite while Nixon gargled along, but in a few weeks my romantic hope was quashed. Now a lively, long, intelligent documentary called **ONE BRIGHT SHINING MOMENT** helps to explain why. Stephen Vittoria, the experienced director who made this film, braiding a series of crisp interviews with McGovern (then and now) and his campaigners and enthusiasts, provides a saddening clarification of McGovern's defeat. Especially sad these days.

The picture begins long before the campaign. It first gives us a biographical summary of George McGovern's life. The son of a South Dakota clergyman, he was a bomber pilot in World War II, returned to get a Ph.D. in history and government, and became a teacher at Dakota Wesleyan. Then he ran for Congress and was twice elected, was once defeated for the Senate, then was thrice elected to the Senate. Of course comparable data could be ticked off for some other politicians, but the surface similarity only makes the McGovern story more remarkable. Unlike most others, McGovern's career seemed exceptionally pure. (What a word for politics!) The film shows us a man who was exceptionally yet not priggishly principled.

Vittoria clearly had a particular reason for making this film just now. It seems poignant in these murky days. Surely there are political people these days who deserve respect, yet seen against the general current background, McGovern refreshes. Mistakes he certainly made. He says in one clip that he most regretted his vote for the Tonkin Gulf resolution that launched the Vietnam War, which he thereafter vehemently opposed. (In a recent interview McGovern said that John Kerry failed because he didn't oppose the Iraq war and instead claimed he could fight it better than Bush. Some of us felt that Kerry was going to lose anyway and that he might as well lose by speaking what we thought was his true belief.) McGovern spoke truth in his campaign, alongside the campaign rhetoric. The truth didn't help.

McGovern's party chiefs didn't much help, either. They permitted his acceptance speech at the Democratic convention to be broadcast at 3 a.m. Newspapers reported that Nixon, watching the Democratic convention on television, laughed with delight. The Democratic managers then gave Nixon more to laugh at. Their first choice for his vice presidential running mate turned out to have a history of mental illness and had to be replaced. Still, as Frank Mankiewicz, a McGovern aide, says in this film, "We lost an election, and the other guys went to jail."

Nobody can know how successful McGovern would have been in the White House, but the atmospheric effect of his presence, especially as regards the disaster in Indochina, would have been nationally, globally, healthful. His portrait in Vittoria's film is in a way painful: we feel very distanced from him today. The title is not a misnomer.

KEANE is extraordinary—vivid, stripped, intense. A thirtyish man named William Keane is searching for his six-year-old daughter who was abducted in the New York Port Authority bus terminal a few months before the film begins. At the start he is burrowing around the terminal with a newspaper clipping about the abduction, complete with photo, asking almost everyone he meets if he or she has seen this child. Immediately we can't help being seized. Very soon we are differently seized. A man asking this question months after the event is someone who has clearly passed the rational; and we know why—or think we do.

The film was written and directed by Lodge Kerrigan who has made two previous pictures (unseen by me). He works with such lean force that we are plunged into the story's emotional center as if we had suddenly been cast into a whirlpool. His collaborator—the best term—is his leading actor, Damian Lewis, who is English but whose American accent is flawless. Lewis's sculpted face, unobtrusively sensitive, his inflections of speech that suggest Keane's complexity, are exactly the qualities that Kerrigan needed for this man whose companionship in hell we must accept.

Keane lives in a cheap hotel room, subsists, as far as we see, on whiskey and cocaine, knows two women with whom he has hot encounters, and views himself as consecrated to this search, regardless of the facts. Down the hall in his seedy hotel lives a young woman who has a daughter about the age of Keane's daughter, and Keane gets to know both. This occurrence of the vicarious child seems at first a bit too neat, but as the film progresses, the neatness is folded under. We see that, far from settling matters, the other child only feeds the story's essence—which is, or becomes, ambiguity.

Fairly soon in the film we suspect that Keane may never have had a daughter—we never actually see the clipping. He may, knowingly or not, have merely imagined this cross on which to crucify himself. He may be a man who, seeing

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the world and himself as they are, has in a Dostoevskyan surge fated himself to suffer. The friendship with the neighbor's little girl leads to another large ambiguity. At the end there are two possibilities facing him. The choice is left open.

This double ambiguity fits Kerrigan's theme. His film enters a realm where all the details—the furniture, the streets, the lights—could not be more veristic, but Keane moves through this real world like someone who is not quite a citizen. John Foster's handheld camera supports this doubleness subtly. A special word of thanks to Abigail Breslin, the little girl, who is both reticent and close, and a further word of thanks to Kerrigan for bringing us Lewis. The actor is in every scene and almost every shot and is compelling throughout. ■

Cass R. Sunstein

The Philosopher-Justice

Farewell Rehnquist, move over Scalia.

ACTIVE LIBERTY:
INTERPRETING OUR
DEMOCRATIC CONSTITUTION
By Stephen Breyer
(Knopf, 176 pp., $21)

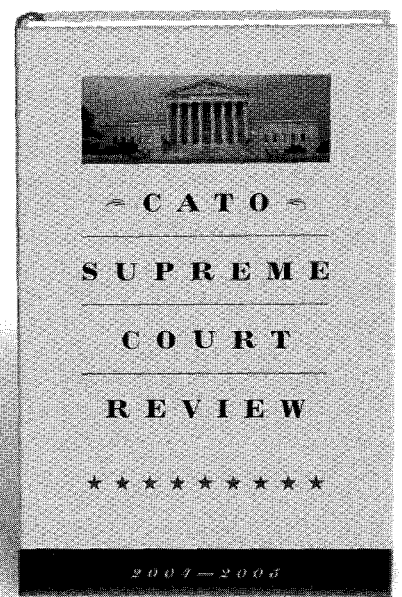
I.

WILLIAM H. REHNquist has died, and John G. Roberts Jr. has been nominated to replace him, and another nomination is still to come: it is an understatement to say that the Supreme Court is in a period of transition. The change of personnel is taking place among conservatives of one kind or another, according to the wishes of a deeply conservative president. Yet all this must not obscure the fact that conservatism on the Court is about to encounter a serious challenge. With this small but important book, Justice Stephen Breyer emerges as a leading theorist of constitutional interpretation on the highest bench in the land. At last there has appeared a direct and substantial challenge, within the Court, to the constitutional thought of Justice Antonin Scalia, who has long offered an ambitious and forceful account about how to approach the Constitution and laws of the United States. For the next decade, I think, much of the intellectual battle, within the Court and within the nation, will have to be conducted with close reference to the conflict between the starkly different constitutional theories of Scalia and Breyer. The impact of President Bush's appointments notwithstanding, liberalism is finally, at the level of ideas, pushing back.

Breyer and Scalia begin with a shared appreciation of the fact that the justices of the Supreme Court are unelected and serve for life. Since the Court has the power to invalidate the decisions of the elected branches, it is not so easy to reconcile the magnitude of its power with the national commitment to democratic self-rule. Throughout the nation's history, many of the most prominent constitutional theorists have tried to resolve this apparent contradiction. They have argued that if the Court acts in a certain way, it can coexist comfortably with democracy after all.

Late in the nineteenth century, James Bradley Thayer argued that the Supreme Court should strike down legislation only "when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question." In Thayer's view, "whatever choice is rational is constitutional." Thayer argued that the Supreme Court should uphold the actions of the elected branches unless the invalidity of their decisions is "very plain and clear, clear beyond a reasonable doubt." Thayer had an influence on Oliver Wendell Holmes, perhaps the greatest figure in the history of American law, who generally agreed with his plea for judicial deference to the legislature. And in the period after Franklin Delano Roosevelt's New Deal, Thayer's approach had a significant role on the Supreme Court, embraced as it generally was by Holmes's disciple Felix Frankfurter. William Rehnquist was

Guilty or Innocent? Judging the Supremes



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himself no theorist, but he showed occasional impulses in Thayer's direction.

The idea of deference to the elected branches lost much of its appeal in the 1950s and 1960s, when the Supreme Court, under the leadership of Chief Justice Earl Warren, was invalidating school segregation, protecting freedom of speech, striking down poll taxes, requiring a rule of one person, one vote, and protecting accused criminals against police abuse. Is it possible to defend the Warren Court against the charge that its decisions were fatally undemocratic? The most elaborate effort came from John Hart Ely, who argued for what he called a "representation-reinforcing" approach to judicial review. Like Thayer, Ely emphasized the central importance of democratic self-rule; but he insisted that if self-rule is really our lodestar, then unqualified judicial deference to legislatures is utterly senseless. Some rights, Ely argued, are indispensable to self-rule, and the Court legitimately protects those rights not in spite of democracy but in its very name.

The right to vote and the right to speak were Ely's central examples. Courts promote democracy when they protect those rights. And Ely went further. He argued that some groups are at a systematic disadvantage in the democratic process, and that when courts protect "discrete and insular minorities," they are therefore strengthening democracy, too. Ely was particularly concerned with African Americans, whom he saw as frequently unable to protect themselves in politics. But with some qualifications, his plea for judicial protection could be extended to women and gays and lesbians as well.

A third theory of constitutional interpretation, espoused most prominently by Scalia and also favored by Clarence Thomas, is known as "originalism." Originalists believe that the Constitution should be interpreted to mean exactly what it meant at the time that it was ratified. If the Equal Protection Clause was originally understood to permit sex discrimination, then courts should permit sex discrimination. If the Second Amendment was originally understood to forbid gun control, then courts should forbid gun control. When President Bush praises "strict construction," many people take him to be embracing originalism. Originalists such as Scalia reject Thayer's approach, because they are quite prepared to strike down legislation that violates the original understanding. They are mystified by Ely's idea of "representation-reinforcing" judicial review. But originalists, too, prize democracy. They emphasize that the Constitution was ratified by "We the People," who have sovereign authority, and they want to limit the discretion of federal judges, who are after all not elected. It is true that those who ratified the Constitution are long dead, and this point creates a substantial problem for originalists; but democracy is nonetheless central to originalist thinking about constitutional law.

As a professor at Harvard Law School, Stephen Breyer specialized in administrative law and regulatory policy. Constitutional law was not his field. As a member of the Supreme Court, however, Breyer has gradually been developing a distinctive constitutional approach of his own, one that can be seen as directly responsive to Scalia and originalism. This book announces and develops that theory. In so doing, it constitutes a major challenge not only to Scalia's principles and methods, but also to the legacy of Rehnquist, with his strongly conservative inclinations. Appearing when the Supreme Court is in transition, and when the national debate about the Court and the Constitution has degenerated into a war of slogans, Breyer's timing is uncanny.

Breyer's major theme is "active liberty," which he associates with the right of self-governance. In his own judicial work, Breyer might indeed be seen as the most consistently democratic member of the Rehnquist Court: among its nine members, he has shown the highest percentage of votes to uphold acts of Congress and to defer to the decisions of the executive branch. But Breyer does not mean to follow Thayer: he does not believe that the Court should uphold legislation whenever the Constitution is unclear. Like Ely, Breyer wants the courts to take an aggressive role in some areas, above all in order to protect democratic governance.

His book comes in three parts. The first builds on Benjamin Constant's famous distinction between the liberty of the ancients and the liberty of the moderns. The liberty of the ancients involves "active liberty"—the right to share in the exercise of sovereign power. Quoting Constant, Breyer refers to the hope that the sharing of that power would "ennoble" the people's "thoughts and establish among them a kind of intellectual equality which forms the glory and power of a people." But Constant also prized negative liberty, meaning "individual independence" from government authority. In Constant's view, which Breyer firmly endorses, it is necessary to have both forms of freedom, and thus "to combine the two together."

Breyer believes that the Founders of the Constitution did exactly that. His special emphasis is on what Constant called "an active and constant participation in collective power." That form of participation includes voting, town meetings, and the like; but it also requires that citizens receive information and education, so as to promote their capacity to ensure effective governance. In Breyer's account, the citizens of post-revolutionary America insisted on highly democratic forms of state government, promoting popular control. Notwithstanding the ambivalent experiences of post-revolutionary governments, the Founders of the Constitution accepted the deepest aspirations of the American revolutionaries, creating a framework with a "basically democratic outlook." The document begins, as it happens, with the words, "We the People," and in Breyer's view its very structure is a testimonial to active liberty. Both the House and the Senate are subject to electoral control. Even with the electoral college, the choice of the president is ultimately traceable to voters, not to an unaccountable elite. Breyer believes that this entire system is "difficult to reconcile with a retreat from democratic principle."

Quite the contrary. Breyer claims that the Constitution can be viewed "as focusing upon active liberty." He thinks that constitutional interpretation should be undertaken with close reference to that central constitutional purpose. In his account, the Warren Court appreciated active liberty, and it attempted to make that form of liberty more real for all Americans. The Rehnquist Court, by contrast, may have pushed the pendulum too far back in the other direction.

So Breyer believes that an appreciation of the idea of active liberty has concrete implications for a wide range of modern disputes, and the second part of his book traces those implications. He begins with free speech. An obvious question is whether the Court should be hostile or receptive to campaign finance reform. With his eye directly on the democratic ball, Breyer suggests that if we focus on the Constitution's basic structural objective, "participatory self-

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government," then we will be receptive to restrictions on campaign contributions. A central reason is that such restrictions "seek to democratize the influence that money can bring to bear upon the electoral process." He thinks that some of his colleagues, most prominently Rehnquist and Scalia, have been mistaken to invoke negative liberty as a rigid barrier to campaign finance restrictions. In the same vein, he insists that the principle of free speech, regarded from the standpoint of active liberty, gives special protection to political speech, and significantly less protection to commercial advertising. He criticizes his colleagues on the Court for protecting advertising with such aggressiveness in recent years. Breyer's interpretation of freedom of speech emphasizes democratic self-government above all.

Affirmative action might seem to have little to do with active liberty. At first glance, it poses a conflict between the ideal of color-blindness and what Breyer calls a "narrowly purposive" understanding of the Equal Protection Clause, one that emphasizes the historical mistreatment of African Americans. Directly disagreeing with Scalia and Rehnquist, Breyer tends toward the narrowly purposive approach. But he also contends that in permitting affirmative action at educational institutions, the Court has been directly concerned with democratic self-government. The reason is plain: "some form of affirmative action" is "necessary to maintain a well-functioning participatory democracy." Breyer points to the Court's emphasis on the role of broad access to education in "sustaining our political and cultural heritage" and in promoting diverse leadership. Underlining those points, Breyer argues that the Court's decision to permit affirmative action made a direct appeal "to principles of solidarity, to principles of *fraternity*, to principles of *active liberty*." In Breyer's view, it should be no surprise that the Court selected an interpretation of the Equal Protection Clause that would promote, rather than undermine, the operation of democracy.

With respect to privacy, Breyer's emphasis is on the novelty of new technologies and the rise of unanticipated questions about how to balance law enforcement needs against the interest in keeping personal information private. Owing to the novelty and the difficulty of those problems, Breyer argues for "a special degree of judicial modesty and caution." He wants to avoid a "premature judicial decision" that would risk "short-circuiting, or pre-empting, the 'conversational' law-making process." Hence his plea is for narrow and careful judicial rulings that do not lay out long-term solutions. In Breyer's view, such rulings serve active liberty, because they refuse to "limit legislative options in ways now unforeseeable." By its very nature, a narrow ruling is unlikely to "interfere with any ongoing democratic policy debate." His argument here is important, because other members of the Court, notably Scalia, have objected to such narrow rulings on the ground that they leave too much uncertainty for the future. For Breyer, such uncertainty may be a friend of democracy.

SOME OF THE MOST NOTEWORTHY decisions of the Rehnquist Court have attempted to limit the power of Congress. Here Rehnquist himself was the leader, and the Court has, since the 1990s, adopted positions that he began to press in the 1970s. The Rehnquist Court struck down the Violence Against Women Act, for example, as beyond congressional authority under the Commerce Clause. It also announced an "anti-commandeering" principle, which forbids the national government from requiring state legislatures to enact laws. In the abstract, these decisions seem to promote active liberty, because they decrease the authority of the more remote national government, and because they promote participation and self-government at the local level. Breyer agrees that the federal system fits with his general theme, since that system makes "it easier for citizens to hold government officials accountable" and brings "government closer to home"; but he strongly objects to the Rehnquist Court's federalism decisions. With respect to congressional enactments, he observes that "the public has participated in the legislative process at the national level," and hence the principle of active liberty calls for deference by the Court. Breyer's special target is the anti-commandeering principle. Speaking in pragmatic terms, Breyer thinks that this prohibition precludes valuable initiatives to protect against terrorism, environmental degradation, and natural disasters—initiatives in which, for example, the national government requires state officials to ensure compliance with federal standards.

Breyer also contends that an understanding of active liberty can inform more technical debates. Consider a prominent example. Should courts rely only on a statute's literal text, or should they place an emphasis instead "on statutory purpose and congressional intent"? Sharply disagreeing with the more textually oriented Scalia, Breyer favors purpose and intent. He emphasizes that a purpose-based approach asks courts to consider the goals of "the 'reasonable Member of Congress'—a legal fiction that applies, for example, even when Congress did not in fact consider a particular problem." Breyer thinks that this approach, as compared with a single-minded focus on the literal text, will tend to make the law more sensible. He also contends that it "helps to implement the public's will and is therefore consistent with the Constitution's democratic purpose." Breyer concludes that an emphasis on legislative purpose "means that laws will work better for the people they are presently meant to affect. Law is tied to life; and a failure to understand how a statute is so tied can undermine the very human activity that the law seeks to benefit."

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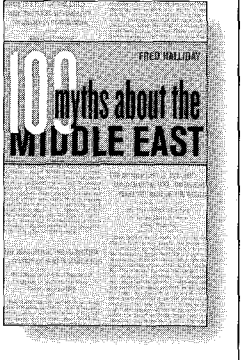

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THE THIRD PART OF BREYER'S book tackles broader questions of interpretive theory and directly engages Scalia's contrary view. Breyer emphasizes that he means to draw attention to two considerations above all: purposes and consequences. Constitutional provisions, he thinks, have "certain basic purposes," and they should be understood in light of those purposes and the broader democratic goals that infuse the Constitution as a whole. In addition, consequences are "an important yardstick to ensure a given interpretation's faithfulness to these democratic purposes." Breyer is fully aware that many people, including Scalia and Thomas, are drawn to "textualism" and its close cousin "originalism"—approaches that argue in favor of close attention to the meaning of legal terms at the precise time they were enacted. He knows that such people are likely to think that his own approach is an invitation for open-ended judicial lawmaking, in a way that compromises his own democratic aspirations. But he has several responses to such criticisms.

For a start, originalist judges claim to follow history, but they cannot easily demonstrate that history favors their preferred method. The Constitution does not say that it should be interpreted to mean what it meant when it was ratified. The document itself enshrines no particular theory of interpretation. And if originalism cannot be defended by reference to the intentions and the understandings of the Framers, Breyer asks, in what way can it be defended, "other than in an appeal to *consequences*?" He knows that some of the most sophisticated originalists ultimately argue that their approach will have good consequences—for example, by stabilizing the law and deterring judges from imposing their own views. So even Breyer's originalist adversaries are "consequentialist in an important sense." (Rehnquist himself never squarely endorsed originalism, but his votes generally lined up with his originalist colleagues. His principles of constitutional interpretation will remain unspecified.)

Breyer also argues that his own approach does not at all leave courts at sea, for he, too, insists that judges must take account of "the legal precedents, rules, standards, practices, and institutional understanding that a decision will affect." Those who focus on consequences will not favor frequent or dramatic legal change, simply because stability is important. But the important point is this: to oppose textualism and originalism is hardly to oppose the careful consideration of the Constitution and statutory law. One of the many services performed by Breyer's book is that it should make it difficult, or even impossible, for critics to caricature the anti-originalist position. Moreover, textualism and originalism also cannot avoid the problem of judicial discretion. Their methods do not provide quite the unmediated and value-free inquiry that they imagine. "Which historical account shall we use? Which tradition shall we apply?" In the end, Breyer contends that the real problem with textualism and originalism is that they "may themselves produce seriously harmful consequences—outweighing whatever risks of subjectivity or uncertainty are inherent in other approaches." His ultimate goal is "a framework for democratic government" that will prove workable over time, and he believes that his kind of purposive approach, rooted in active liberty, is most likely to promote that goal.

II.

THIS IS A BRISK, LUCID, AND energetic book, written with conviction and offering a central argument that is at once provocative and appealing. It is not usual for a member of the Supreme Court to attempt to set out a general approach to his job; and Breyer's effort must be ranked among the most impressive of such efforts in the nation's long history. For that reason alone, the appearance of his book is an event of considerable importance. Scalia has long been traveling the country, making the argument on behalf of originalism and contending that there is no real alternative to it. Breyer demonstrates that on this point Scalia is wrong. Moreover, he does so in a way that is unfailingly civil and generous to those who disagree with him—and thus provides a model for how respectful argument might occur, even on a bench that has become polarized by unusually hot rhetoric.

Breyer's specific arguments make a great deal of sense. In the domain of personal privacy, for example, the Court should indeed be aware of how little it knows about current technological developments, and narrow rulings have the valuable feature of avoiding premature solutions. In general, Breyer makes a reasonable plea for judicial restraint, and it is illuminating to hear that plea from one of the Court's "liberals." But one of his largest claims is more general still: that any approach to legal interpretation must be defended in a way that plays close attention to its consequences. Despite its simplicity, this point is widely ignored.

It is hardly enough for originalists to defend their approach in strictly historical terms. Even if those who ratified the Constitution meant to hold us to their specific views—itself a much-disputed claim—it is up to us, and not to them, to decide whether to follow those views. The question of whether originalism is a sensible approach to constitutional law cannot be answered without reference to its consequences—and its consequences do indeed seem to make originalism unacceptable, because they would threaten so many contemporary rights and understandings. Just for starters, originalism would permit the national government to discriminate on the basis of both race and sex; it would allow state governments to discriminate on the basis of sex; and it would probably allow state governments to segregate people on the basis of race. (Rehnquist's refusal to endorse originalism may plausibly be attributed to the fact that it would produce unacceptable consequences; he was something of a pragmatist.)

For all these reasons, I believe that Breyer's approach is theoretically appealing as well as historically significant; but he offers a sketch, not a sustained argument, and he leaves significant gaps. Above all, he says too little about the difficulties that judges face in assessing consequences and in describing purposes. Recall that, in discussing the interpretation of statutes, Breyer argues for close attention to purposes, understood as the objectives of a "reasonable legislator." It should be obvious that different judges will often disagree about what a reasonable legislator would do. Imagine a law that condemns "discrimination on the basis of sex," and suppose that a state adopts a height and weight requirement for police officers, one that excludes far more women than men. In deciding whether this requirement is "discrimination," how shall judges characterize the purpose of a reasonable legislator? It is inevitable that courts will see their own preferred view as reasonable. Does this promote active liberty? And the problem is pervasive: laws rarely come with clear announcements of their purposes.

The textualist Scalia ridicules the resort to purposes, which, in his view, are

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often made up by willful judges. He believes that an emphasis on text, which is what after all has been enacted, promotes democratic responsibility, and also helps to discipline the judiciary. Textualism itself might easily be defended with reference to the principle of active liberty. Perhaps Scalia overstates the constraints imposed by text, but Breyer underplays the risk that any judgments about "reasonableness" will be the judges' own, in a way that disserves democracy itself. We may agree that any theory of interpretation has to be defended in terms of its consequences; but for interpreting statutes it is not at all clear that a purpose-based approach, focusing on consequences in particular cases, is preferable to a text-based approach, which asks judges to think little or not at all about consequences. Textualism might well lead to better results, all things considered. None of this means that Scalia's approach is necessarily superior to Breyer's. It means only that Breyer has not adequately engaged the possibility that, on his own consequentialist grounds, and with an eye on democratic goals, textualism in the interpretation of ordinary statutes might be better than an approach that explores purposes.

IN FACT, THIS PROBLEM PERVADES Breyer's general thesis about active liberty. To say the least, his investigation of constitutional history is sketchy, and he slides quickly over intense academic debates about what the American Framers actually sought to do. Breyer is not wrong to say that the Framers wanted to recognize both active liberty and negative liberty. Yet the Framers saw themselves as republicans, not as democrats, and they did not believe in participatory democracy, or in rule through town meetings. Of course they attempted to provide a framework for a form of self-government—but so stated, that goal operates at an exceedingly high level of abstraction, which does not easily permit interpreters to bring it to bear on concrete cases. Most of the time, we cannot easily link the general idea of self-government to particular judgments about contemporary disputes in constitutional law.

Certainly Breyer does not try to argue, in originalist fashion, that the actual drafters and ratifiers of the Constitution wanted to allow campaign finance reform, restrictions on advertising, affirmative action programs, and federal commandeering of state government. He argues instead that the idea of active liberty, which animates the Constitution, helps to justify these judgments. But exactly what kind of argument is that? The Framers of the Constitution also placed a high premium on "domestic tranquility," to which the preamble explicitly refers. Would it be right to say that because domestic tranquility is a central goal of the document, the president is permitted to ban dangerous speech? Or that, if affirmative action threatens to divide the races in a way that compromises "tranquility," color-blindness is the right principle after all? In any event, Breyer emphasizes that the Constitution attempts to protect negative liberty, too. Why shouldn't a ban on campaign finance restrictions be seen to follow from that goal? If the answer lies in the idea of active liberty, why shouldn't we see campaign finance restrictions as offending, at once, both forms of liberty?

Or suppose that we accept, as we should, Breyer's claims about the centrality of active liberty to the constitutional design. Is originalism, therefore, off the table? Not at all. We might believe, with some constitutional theorists (including Alexander Hamilton), that constitutional provisions, as products of an engaged citizenry, reflect the will of We the People, as ordinary legislation may not. If so, an emphasis on the original understanding can be taken to serve active liberty at the same time that it promotes negative liberty. It serves active liberty because it follows the specific judgments of an engaged citizenry. It promotes negative liberty to the extent that those judgments favor negative liberty. I do not mean to suggest that such an argument is convincing; the fact that the Framers and the ratifiers are long dead creates grave difficulties for those who argue for originalism in democracy's name. My point is that Breyer's emphasis on active liberty is pitched at too high a level of generality to rule originalism out of bounds.

Or return to Thayer's claim that the Court should strike down legislation only if it clearly violates the Constitution. Despite his general enthusiasm for restraint, Breyer does not mean to follow Thayer. But why not? Thayer and his followers can claim to favor active liberty, because they allow sovereign people to do as they choose. Perhaps Breyer thinks that this approach undervalues negative liberty. But why? Maybe a deferential Court will ultimately produce exactly the right mix of the two kinds of freedom. Ely's approach, emphasizing reinforcement of democratic processes, can easily be rooted in active liberty. Breyer writes approvingly of the Warren Court on the ground that its decisions promoted active liberty; and Ely is the Warren Court's most systematic defender. Does Breyer mean to endorse Ely? If not, where does he differ from him? It is puzzling that Breyer's book lacks even a single reference to Ely's well-known argument. (Breyer is rather ungenerous to other theorists who have toiled in the same vineyard, above all to Frank Michelman, who has been making claims about "active liberty" for over two decades.)

Recall that Breyer does not claim that legislative "purpose" is always something that can simply be found. "Purpose" is sometimes what judges attribute to the legislature, based on their own conception of what reasonable legislators would mean to do. If this is true for the purposes of individual statutes, it is also true for the purposes of the Constitution as well. When Breyer asserts that the "basic" purpose of the Constitution is to protect active liberty, so as to produce concrete conclusions on disputed questions, his own judgments about the goals of a reasonable constitution-maker are playing a central role in his assertion. Fortunately, Breyer's own judgments are reasonable; but he underplays the extent to which they are his own.

The same point bears on Breyer's enthusiasm for an inquiry into consequences. Consequences do matter; but some of the time it is impossible to assess consequences without reference to disputed questions of value. Consider the question of affirmative action, and suppose, rightly, that the text of the Constitution could be understood, but need not be understood, to require color-blindness. If we care about consequences, will we accept the color-blindness principle or not? Suppose we believe that affirmative action programs create racial divisiveness and increase the risk that underqualified people will be placed in important positions. If those are bad consequences, perhaps we will oppose affirmative action programs. An emphasis on consequences as such is only a start. To be sure, Breyer is not concerned with consequences alone; he wants to understand them with close reference to purposes, above all "active liberty." But as I have suggested, that idea, taken in the abstract, is compatible with a range of different approaches to

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constitutional law. It does not mandate Breyer's own approach.

None of this means that Breyer is wrong. On the contrary, I believe that he is largely right. He is right to say that the free speech principle should be understood in democratic terms. He is right to say that where the Court lacks important information, it should rule cautiously and narrowly. He is right to resist the constitutional assault on affirmative action programs (an assault that, by the way, is extremely hard to defend in originalist terms). He is right to reject originalism. Above all, he is right to emphasize the importance of democratic goals to constitutional interpretation. The problem is that he underplays the inevitable role of judicial judgments in characterizing purposes and in assessing consequences. But no approach to interpretation can avoid the interpreter's own judgments. A fuller account than Breyer has given here would specify the underlying judgments and attempt to defend them in far more detail. Such an account would have to show that courts are both willing and able to proceed as Breyer suggests; and it would also have to show that as compared with alternative possibilities, a democracy-centered approach of his preferred sort really would promote self-government, properly understood.

Active Liberty is a sketch, not a fully developed argument. But even sketches can change the way we look at things. With its modesty, its self-conscious pragmatism, and its emphasis on the centrality of democratic goals, Stephen Breyer's approach provides an eminently reasonable foundation for constitutional law. It is an approach that deserves a place of honor in national debates, now and in the future, about the role of the Supreme Court in American life. ■

Anne Hollander
Palette

FOOD IN PAINTING:
FROM THE RENAISSANCE
TO THE PRESENT
By Kenneth Bendiner
(Reaktion Books, 238 pp., $35)

THIS INTENSE LITTLE BOOK'S brusque title is apt. Armed with strong feelings and forthright views, Kenneth Bendiner covers immense territory and makes no pretense at being exhaustive. He cares deeply about the way pictured food appears, because he obviously cares deeply about food itself. He is the champion of pleasure in food and of those painters of foodstuffs in whose works the satisfactions of food are rightly dwelt on, whatever else is happening. He disapproves of an artist who uses fruit or meat or bowls of soup primarily to embody other things—the sovereign power of art, for example—unless the picture also displays food's own satisfying relation to eating.

He praises the traditional still life painters, beginning with the Dutch, who grouped together the components and the appurtenances of an eventual meal, to suggest its happy creation and later consumption. He especially loves those who painted inviting snacks—a plate of open oysters and a partially sliced ham, together with a casually bunched napkin and a nearby knife handle offered to the viewer. Painters who used ill-assorted eatables, utensils, textiles, and vessels only to create great compositional effects earn his scorn.

Bendiner sees Wayne Thiebaud's regimented ranks of multi-flavored pie-wedges as censuring capitalist mass production and commodification, and Andy Warhol painting his soup cans out of "moral disdain" for the way "packaging replaces nourishment" in a new soulless world. He marvels, however, at the way those soup cans were received with delight, often as nostalgic souvenirs of childhood, even while Warhol's pictures of electric chairs were rightly understood as social criticism; and he goes on to attribute the public's love of the soup cans to an unconscious food fetishism.

Indeed, he believes that people perceive any pictured food that way, with a pleasure created by a general cultural fetishism, to wit: if fetishism is defined as the bringing of the uncontrollable under control by means of a psychological transformation of it into an object that can be manipulated—in this case, however, the non-psychological but actual transformation of beasts and plants into objects for human nourishment—then "it does seem that the fetishism of food—the replacement of a living thing with a dead object—is central to paintings of food. It is fetishism that gives food pictures their most enduring sense of pleasure." But I should think that those soup cans were adored for the purity of their cannishness, and that the fetish in operation was what generates the deliciousness of all mass-produced goods. It is what makes the picture of identically sized pie-wedges delightful, precisely because it celebrates the machine-made perfection of each mouth-watering slice.

DESPITE WHAT HE THINKS IS everyone's appropriate fetishistic pleasure in food painting, Bendiner feels he must be food's champion in the painted universe, because he believes it to have been generally despised therein. He points out that still life had the bottom rank as subject matter for painters during the long period when scenes of myth and history were highest on the list. Food was too familiar and necessary, too bodily and quotidian, to be exalted in paint—except, of course, in the founding religious scenes, the Fall of Man and the Last Supper. The eating that led mankind into sin and the eating that redeems mankind have merited plenty of attention from painters, but their images rarely emphasized the looks of the food, and they showed nobody placing anything in the mouth.

Painters tended, quite suitably, to make the Last Supper table resemble an altar, and to keep its food and drink out of the range of any viewer's mundane appetite, while emphasizing Jesus's transformative words. The Fall of Man scene, on the other hand, required emphasis on temptation. Painters rarely made the forbidden fruit itself look luscious, since two full-length, attractive nude bodies dominated the picture, and the story goes that the first temptation arose from the prohibition, not the fruit. Scripture only im-

Anne Hollander is the author, most recently, of the text for WOMAN IN THE MIRROR, *Richard Avedon's last collection of photographs, scheduled by Harry N. Abrams to appear in October.*

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plies that eating the fruit led to the lusts of the flesh, but the link between fruit and sexual temptation is forever made by such images, which permit apples in particular to signify sexuality in later paintings. Bendiner's fifteenth-century example is the great *Adam and Eve* by Hugo van der Goes, who in fact makes Eve's two plucked apples look luscious, whereas Bendiner calls his slim, Netherlandish bodies "slinky," not really the best term for them. I think he means that their outlines are curvilinear although their flesh is not succulent; and he may be seeing their resemblance to the nearby rampant serpent.

The idea that the unspecified fruit in Eden was an apple got support in the Renaissance from the ancient Greek story of the Judgment of Paris, who awarded the golden apple marked "for the fairest" to the Goddess of Love. Paris rejected the power and the riches that wise Athena and royal Hera offered him, because Aphrodite promised him Helen of Troy for his wife. Many paintings exist of that fatally irresistible temptation, where Helen may be the prize, but we see Paris give Aphrodite the apple for her own sublime attractions. Bendiner says that later paintings of beautiful women with nearby apples carry a whiff of this legendary pagan tribute, right along with Christian suggestions of carnal sin—the Latin *malum* meaning both apple and evil. He might have added that for sin, at least among French-speaking painters, peaches make the same point because of *pêche* and *péché*, in addition to that velvety fuzz and those blushing globes.

Bendiner tells us that fruit is by far the most common food in painting—more common, he says, in art than in the diet—and that the pictorial suggestion is repeatedly made that fruit is for the eye. This accords well with its ancient tempting and feminine associations; but he never admits that fruit in real life seems flirtatious, deliberately seductive, willfully inviolable in its bright, tight costume, seeming both to wish and not wish to be ripped, stripped or (help!) bitten. But fruit withers and spoils if not eaten, and realistic fruit-painting seems to have been invented in antiquity so that fresh fruit might keep its tempting beauty forever intact. Later Dutch painters, on the other hand, would add spots of rot to painted fruit on purpose, to show the transience of ripeness. Bendiner points out that most painters do not show fruit being eaten, except sometimes by kids and boors, or maybe by mythical satyrs munching grapes.

Bendiner further emphasizes that most actual eating of any kind in painting is done by low lifes, often to excess, sometimes accompanied by vomiting and rude behavior and always presented as low comedy. As part of that mode, food can be used to bring out the crudest aspect of human animals. Bosch's humanoid monster in the "Hell" panel from *The Garden of Earthly Delights* shows the mouth that ingests in direct relation to the anus that defecates. Decorum usually kept such gross sights out of paintings, but extreme license was natural to the graphic arts, and European prints since 1500 show much more specific and unsightly eating and vomiting than paintings do—along with much more explicit excretion, copulation, torture, and slaughter. It's all there in black and white.

Bendiner divides Western food paintings since the fifteenth century into three large, loose categories, beginning with "The Market," continuing with "Preparing the Meal," and culminating in "Meals," where he offers a large array of meal-pictures (some uninhabited) as diverse social and emotional mirrors—not excluding some more sacred references, as in Norman Rockwell's famous *Freedom from Want* Thanksgiving table, where he somewhat perversely finds Last Supperish flavors. But the market section begins even more perversely, with a fifteenth-century Netherlandish panel showing *The Gathering of Manna*, a painting which this impetuous author wants to label "an anti-Semitic diatribe."

Manna fed the Hebrews during their forty years in the desert, descending from on high as a rain of small, white wafers that rotted if they were not eaten the same day. The Flemish painter shows normally clad medieval men in recognizably Jewish headgear, some of them bearded, and wimpled, turbaned women with children, all holding out vessels and garments to catch the descending snow of wafers, or setting out tubs on the ground to let them fill. Moses and Aaron stand together at right exclaiming and praising God. All faces look sad and serious, maybe one or two with biggish noses. All wear the gear that shows the role they play, in the fifteenth century, pageant-related way of dressing legendary figures; but none have "gross, stereotyped physiognomies." Nor does the painting appear "hateful, bitter and desperate," with the Hebrews deliberately shown displaying Typical Greed and Miserliness. All behave decorously, even the children who help to pick up the wafers and put them into pots; nobody is elbowing anybody else out of the way, or stuffing himself, or hiding the food from others. The figure composition is harmonious, symmetrical, and somewhat dance-like, as befits the re-enactment of a miracle.

But Bendiner is eager to have us feel uneasy about this image and find it reprehensible, mainly because it shows measured, ready-to-eat food freely dropping from heaven, instead of raw materials being plentifully set out for sale in the righteous atmosphere of fair exchange. He wants to contrast a disapproving response, generated by the "repellent" image of "a free meal," with the soothing satisfaction aroused by paintings of well-stocked marketplaces. There, money is exchanged for goods, just as labor and husbandry have first been exchanged for the good harvest and fine cattle that produced them; and nothing has come of nothing.

It is the wonderfully untidy abundance in market scenes that he wants to contrast here with the meager, evenly sprinkled manna flakes, to turn our minds to "the desperate tone that pervades the whole history of eating before the eighteenth century." He says that, according to the sociologists Norbert Elias and Stephen Mennell, "for long periods eating was a violent, unnerving swing between starvation and stuffing." The food supply was always local and therefore always uncertain, before the rise of trade and efficient transport permitted local shortages to be supplemented from elsewhere. On feast days everyone gorged, because who knew when the crops might fail or murrain strike the cows. Market paintings, Bendiner says, "seem to exist to quell anxiety."

Bread and water, mixed together and heated, made the gruel on which peasant life was sustained—perhaps more palatably if flavored with onion, and sometimes with butter or bacon when church restrictions allowed. Meat was the true standard of good eating, and the absence of meat and meat products in pictures meant privation or fasting. Thus butcher's stalls were the subject of the first market paintings, with immense sides of beef and legs of lamb, multiple pigs' feet, and many plump geese suggesting unbelievable feasting in the offing. A still life

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picture featuring bread, fish, and a glass of beer, by contrast, could suggest not only ritual abstinence but virtuous self-mortification. Vegetables were always accessories, not rendered as primary no matter how handsome and tasty; and fruit was fruit, the same since Eden, often shown being sold by plump and tempting young women.

THE PAINTING OF FOOD-stall scenes and food still life became customary only in the middle sixteenth century. Some have surmised that painters then, inspired by Renaissance classicism, wished to reproduce the effect famously described by Pliny the Elder of the grapes painted so realistically by the Greek painter Zeuxis that birds flew in and pecked at them. Apart from such aesthetic possibilities, however, and in line with the iconoclastic impulses of the Protestant Reformation, a new secularization of painterly subject matter was then on the rise in Europe. Madonnas were losing ground, and frequently being burned. Peasant life was becoming an acceptable theme for large works, and the purveying of food was a large part of that life.

A retreat from religious subjects and the embrace of genre material are made very plain in Pieter Aertsen's unnerving work, four feet high and almost five feet wide, called *Butcher's Stall with the Flight into Egypt*, painted in 1551. The whole foreground of this big canvas is filled with a jumble of reddish dead animals and animal parts, beginning with an immense cow's head that stares at us, its jaw overhanging a tub of lard. Strings of red, white and yellow sausages snake around the big and disparate carcass pieces, which hang from a jutting pole or nudge each other atop a barrel, a covered basket, a low stool, a small table. Is this open structure with its red-tiled roof really a butcher's stall? We see a few lonesome fish, some pies, two pretzels, a half-wrapped cheese, and nobody minding the store, just a man outside carefully filling a jug from a bucket. Far out in back, however, where trees and turf meet the sky, a tiny Joseph leads a tiny donkey carrying Mary, who grips swaddled Jesus and leans to drop alms into a beggar's hat. Smaller figures troop off in the same direction, other miniature mendicants approach Mary, and we watch all this framed between a hanging pig's head and half an ox. What is going on?

In Nowhere

as pointless as a place
as a coastline moving through winter fog

*

and in no time

as dew point comes
again and again

*

what a state we're in

ice to liquid to vapor
O Hail—Rain—
Plain Light bent in primary tears O

Broken One

MURIEL NELSON

Some new contrast is being made between carnality and higher things, though it is not clear which one is being approved at the expense of the other. Earlier painters had built mundane food neatly into sacred scenes, such as the Marriage at Cana, or portrayed it as a luxurious part of noble feasts involving gold and silver plate. Bendiner also remarks that compositions of dead game had been painted as emblems of aristocratic prowess well before the rise of the new market mode. But now painters began celebrating only the abundant jostle of raw foodstuffs, as if to suggest the powerful commonality of basic fleshly existence, often giving the image an erotic or comic cast to keep the level low. In such pictures, the overwhelming vitality of the dead stuff itself is what painters made so striking, showing its obedience to a universal physical rule that transcends any authority of faith, church, or king.

These later sixteenth-century food painters also ushered in the great era of breathtaking still life largely associated with Dutch artists, who influenced all later breathtaking painters in the genre and finally gave food painting its authority and good name. The early seventeenth-century Dutch painters not only followed their own emerging tradition, they were also inspired (as were many in other countries) by the young Caravaggio, whose freestanding basket of over-ripe and spoiling fruit from 1600 is said to be the first true still life. Just like the flower specialists, however, the later Dutch food painters often went beyond realistic Caravaggio—and well beyond unimaginative, myopic Nature—by ostentatiously combining perfect fruits and vegetables that ripened at different seasons, to create ravishing sights impossible in real life.

Going still further, Rembrandt with his *Slaughtered Ox*, which Bendiner eloquently compares to a crucified Christ, or Velázquez with his fraught and somber *Kitchen Scene with Christ in the House of Mary and Martha*, or Terborch with his hushed and delicate *Woman Peeling Apples*, were later able to convey a sense of accord between physical fact and moral or spiritual truth through the deft rendering of foodstuffs. This was the very synthesis that Aertsen and his circle had rejected a century earlier, when they aligned all human food with brute materiality. Only later, in both Catholic Spain and Protestant Holland, as still later in Enlightened France, could the sheen on the onion begin to suggest inward, human illumination, even with no persons in the picture.

Bendiner considers the intense "majesty and concentration" of one of the jewels of the Rijksmuseum, a small painting by Adriaen Coorte from 1697, consisting entirely of a bunch of asparagus tied with twine, lying aslant a single loose spear on a cracked stone sill. "The lighting ... turns them into translucent tubes of paper-thin fragility, set amid a haunting Baroque darkness." And he adds: "Coorte ... gave the ... subject such effulgence that one wants to see it as ... something symbolic of God or humankind as a whole—with relations of the individual to the group set out in problematic configuration. Rarely has the significance of the insignificant been so adeptly suggested." This is one of the few times that Bendiner allows any painted food an anthropomorphic cast, unless it is a dead creature, such as Rembrandt's sacrificial *Ox*, or Chardin's pitiful *Ray*. They mainly serve him as exceptions to a generally satisfying effect that he always wants to see in food still life painting. He gladly describes painted food's sexual suggestiveness, with its sensual shapes and its perpetual assimilation by artists to the charms of the young; and he has a whole section on the way painters indicated the supposed aphrodisiac effects of oysters.

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But he does not notice any painter giving personalities to pieces of fruit, or to a perfect pie or single loaf, making them display themselves with bravado, or timidity, or resignation, with artless naïveté or indeed with a keen awareness of their allure, as if they were sitting for their portrait.

They often seem to do just that, especially if accompanied by a bottle, glass, or jug posing as a fellow portrait-subject. Many painters must have attempted to convey a distinct personality for each loaf of bread or head of garlic, each cut of beef or chunk of cheese. Chardin certainly did. Bendiner does not feel this element in most of Chardin's still lifes; and Zurbarán's horizontal lineup of lemon plate, orange basket, and rose-decked cup and saucer, much too straight for any table, looks to him like an arrangement set out on an altar and not like actors taking their curtain call on a stage. Cartoonists and graphic artists, of course, have endlessly and shamelessly put legs and faces on foodstuffs, and given them speech ("I'm Chiquita Banana" and so on); and in the kitchen itself you sometimes think you can see the twisted pepper feeling ill at ease among his well-built fellows. But Bendiner will not permit the painter to raise the object up to human level. It would interfere with his fetishism theory.

PAINTED KITCHEN AND MARKET scenes naturally overlap, as the bought food lately set out for sale is taken into the house and set out again for attack. Sixteenth-century female cooks were painted as Michelangelesque amazons wielding heavy utensils against the disorderly horde of enormous cabbages and huge chunks of pork lately snared in the marketplace. We watch these tough fighters, and their colleagues in the following century, in battle among huge vessels that crowd the floor, gripping the necks of hapless geese to pluck them, heartlessly flaying supine carrots, and mercilessly grinding frail sprigs into powder or crushing turnips into mush.

Paintings from the sixteenth and seventeenth centuries indicate that kitchens were the inconvenient and uncomfortable sites of hard physical work, none of it aimed at creating imaginative dishes that might seduce the palate. That dimension of cookery opened up only in the eighteenth century, along with a friendlier ambience in the scene of its efforts. Then Bendiner's illustrations show that the warrior cook might even be absent while the kitchen maid, formerly a sullen, sleepy drudge, might now join all the sprightly, approachable shepherdesses and ribbon-sellers thronging the eighteenth-century pictorial scene.

Still life paintings without visible humans imply human society, and Bendiner is more interested in those implications than in the soul of any painted tomato. As part of his "Meals" section, he shows how seventeenth-century Dutch painters often crowded rich vessels filled with luxurious food and drink onto one corner of a table, prepared as if for one person alone—the viewer himself—to take possession of, rather than sit down at. He does not say this, but it looks as if such works illustrated the lines from Psalm 23: "Thou preparest a table before me in the presence of mine enemies.... My cup runneth over." The high density of luxury flatters the client and whets his appetite for ample riches and ample dishes in the same image, which would include a suitable gratitude to God among his many pleasures.

By contrast, Dutch painters' methods were refined in eighteenth-century France by Chardin. He could create a radiant, contemplative aura around a pottery jug, a glass of water, a clove of garlic, and some heads of an unidentifiable spice, all about to figure in the perfecting of a rare if unspecified delicacy. Bendiner sees this as illustrating the final triumph of human agency over nature. Using similar components to create a very different atmosphere a century later, Monet painted his forthright *Still Life with Beef* using a pottery jug, a clove of garlic, and a big chunk of raw meat, as if thrusting upon us the basic facts of working-class life. Stewing beef was by then a staple of the poor, and meat was no longer a holiday feast or an upper-class luxury. Instead, the nineteenth-century upper classes were appreciating the refined flavors and textures deployed by skilled professional chefs—already implied by Chardin—and no longer relishing the crude work of athletic cooks.

BENDINER MOSTLY DEALS WITH painted meals attended by real and not implied people, beginning with the state dinners rendered in fifteenth- and early sixteenth-century illuminated manuscripts. There the ruler is the only person seated, except maybe for a Prince of the Church, at a temporary table displaying ornate vessels and prepared dishes, with an honorific panel placed behind him. Many surrounding persons, both noble (rich garb) and humble (towel over the shoulder) stand by to serve him or feed the dogs, some of which jump up on the table. All present are male, except maybe the dogs. Precious plate is pointedly shown off on a nearby sideboard, but forks and spoons are nowhere to be seen, nor is any eating being done except by the dogs.

We learn that between 1400 and 1700, forks do not appear on any tables in art, but that a man usually had his own knife with him to use at meals. Most people of all classes, says Bendiner, ate with their fingers during the whole three hundred years, even sopping up soup with bread. At a banquet celebrating the Peace of Munster in 1648, recorded in a painting by Bartholomeus van der Helst, we find the food on the table nearly obscured by the hefty clothing of the many thick Dutch gentlemen around it. We do see one of them actually eating a slice of pie, apparently held up on a knife-point. No women are visible.

We see fine ladies, elegant trollops, and festively dressed village women interspersed with men in succeeding epochs, in images of increasingly congenial-looking

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and sometimes disorderly indoor dinner parties, or alfresco spreads during the hunt, or outdoor wedding feasts and all sorts of picnics, from Monet's cold chicken and champagne among hoopskirts on the grass in 1866, and among Tissot's bustles by the lake in 1876, on to John Sloan's hotdogs among bulky swimsuits on the beach in 1907. "The picnic stands as the ultimate vision of the artificiality of the natural ..." Bendiner observes. He points out that before the eighteenth century (once again) there was no special distinction between dining indoors or outdoors, and no fixed place was allotted to eating. A table would be set up specially for the individual feast, of the right size and in the best place.

Bendiner's sequence of illustrations records elegant people replacing formal display with conviviality and relaxation, and his descriptions suggest that ritual shows of rank were being wholly given up for pleasure's sake. He barely touches on the fact that formal seated dinners featuring rich clothing, attentive servitors, and a great emphasis on rank remained a constant element in ruling-class life all the way through the nineteenth and twentieth centuries, with the addition of multiple forks and other difficulties. But painters stopped using such events as subjects, and stiff formal dinners lost visual value except for cartoonists and satirists. Bendiner does include Diego Rivera's fresco called *Wall Street Banquet*, from 1928, where well-known white-tie-wearing tycoons and a bejeweled woman share a meal composed of a single serpentine length of tickertape, which everyone touches but nobody tastes.

We are also given Sir William Quiller Orchardson's *Mariage de convenance* of 1883, showing an ill-assorted married couple enduring formal dinner alone together at home. They both wear full evening dress, he in a stiff shirt with a high collar and white tie, she bare-armed and décolleteé in a corseted dress with a bustle and train. They sit at opposite ends of a long table decked with crystal and porcelain, and a servant in evening dress pours wine for the master. The elderly husband leans forward over his plate to look down the table at his wife, who leans far back from her end, chin in hand, eyes down. Neither one is eating, but the man's right hand is on his knife handle. Bendiner uses this scene to exemplify the many extant meal-pictures composed as novelistic vignettes, although it seems more like a scene from a play, with stage food. But he might well have compared it to his earlier illustration of the elaborate Renaissance meal where the isolated grandeur of well-served solitary royalty was portrayed. There, any possible emotional tension was omitted along with the presence of any ladies, and the free presence of the dogs added some joy. It is clear that this old gentleman should have dined with his dog instead of his dissatisfied wife.

After the mid-seventeenth century, painters of meals followed the Baroque taste for mobile and informal gatherings, a look the Baroque artists used as easily for sacred scenes as for secular parties. Restaurants, which came into existence during the eighteenth century along with so much else, made good settings for such pictures of casual groups. Nineteenth-century European painters could follow the old Dutch tavern scenes with modern French café scenes and Austrian pastry-shop scenes, or show Danish and Italian innkeepers serving pleasure-seeking foreign students along with big, local families. Relaxation and satisfaction infuse these works, even though food is not emphatic in them.

Bendiner includes a few equivocal pictures, too, such as Manet's celebrated *Luncheon in the Studio*, a lush and peaceable composition suffused with such ambiguous relations among the human beings, the objects, the food, and painting itself that pleasure stays in abeyance while we watch to see what develops. We also visit lone diners sitting before minimal fare in sad restaurants—Hopper is well represented here, backed up by Van Gogh and Munch—and emotional moments *à deux* across public tabletops. Providing such moments for lovers became a chief function of restaurants, and single diners in pictures tend to look deprived. Bendiner is particularly sorry for them, and he exaggerates their pain, using words such as "harrowing" to describe the image.

He wants to show how tension, alienation, and anxiety can be conveyed in restaurant pictures, and not just in the glum domestic meal scenes of which he has several examples; but he is quite unhappy with all such works, however true they may be to real life. More, he is deeply offended by Richard Estes's street-painting called *Diner*, done in 1971, where three empty booths each marked TELEPHONE mask the doorway of a metallic eatery marked DINER—no entry, no food, no sight or touch of others. Bendiner seems to feel that the act of eating is being betrayed in all these paintings. Difficult solitary moments, distant forms of communication, and all detached preoccupations should never be shown to poison a setting devoted to the basic yumminess and chumminess of food.

He is therefore most offended by Cézanne, who single-handedly wrecked (he thinks) the integrity of the great still life foodstuffs that had sustained all the variations of food-painting after the sixteenth century. Cézanne did this by forever separating all future painted apples—or oranges, fish, cheese, cutlets, pastries, oysters, carrots, cherries—from their primal source of power over the appetite. Once a pear is made to sit on a swatch of brocade alongside an irrelevant violin and bunch of keys, say, and its distinctive looks are forced to combine obediently with those of the other things into a picture forged by the tyranny of a painter's will, the pear has lost its artistic honor as a pear. It has become part of a set-up, unfit for anything but future set-ups.

When Claesz. in the seventeenth century, Chardin in the eighteenth, and Harnett in the nineteenth put food on the table, it was always food—charged with multiple associations, drenched in centuries of changing custom, and forever compelling for itself. Those pictures, too, were supremely composed, but the food was kept in its gustatory and social context, whether suggesting constraint, riches, or worldly vanity. Bendiner hates post-Cézanne modernism for letting all that ancient power and significance wither for mere art's sake. He is somewhat heartened and cheered by the Pop Art period of post-modernism—the Thiebaud pie slices—because some of the old lusciousness again became primary, with the help of ad-art conventions. Indeed, how else? He acknowledges color photography as the great new vehicle of food beauty; which he insists mainly satisfies our "fetishistic sense of human control." That sense, of course, also went by the board during the sway of modernism; and not everyone has a fetishistic sense of artistic control.

Bendiner points firmly to the sixteenth-century food artists as great liberators, who allowed serious food imagery to provide an important channel that could bring the greatness of the Renaissance directly into the culture of the present. One way this shows is in the consistency of the

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still life menu—the same apples and fish, bottles and lemons appear through four centuries. Brueghel is naturally one of Bendiner's food heroes, although he never fails to chide the painter for sneering at the poor by making them look extra stupid and foolish. In fact, one of Brueghel's great distinctions was that he never exaggerated and did not sneer. His essentially generous view of peasant life made his contemporaries laugh in recognition, because it all looked just right.

THERE IS MUCH MORE IN THIS book about different aspects of food painting, including pictures of families saying grace, and of children being trained in good eating habits. There are early sections on the way ancient medical rules affected the later composition of still lifes, others on the way precious spices were shown, and on drink in its relation to food in pictures; and there are separate sections on tea, coffee, and chocolate, all described by the author as refreshments usually taken between meals to produce a thoughtful calm. Caffeine is not here recorded as the vigorous stimulant that once kept students up all night either finishing overdue papers in little rooms, or else embarking on perilous love affairs in little coffee shops, alcohol being beyond the pocketbook; but of course, no paintings may exist of these historical subjects.

A final, dutiful-seeming chapter is about Surrealism, symbolism, and the decorative aspects of food painting. Arcimboldo's veggie-man profile heads are here, and Magritte's picture called *The Portrait*—aha!—in which a slice of ham on a plate regards us with a central, human eye, while a stalwart full bottle and a diffident, empty glass stand guard, and the adjacent fork lies on its face. This was standard fork-placement in Europe, but Bendiner sees its prone position as suggesting disorder. We look at Brueghel's *Land of Cockaigne*, wherein endless gluttony is the fantasy, and at the curious cucumber and apple that lie prominently in the street outside Mary's door in Crivelli's *Annunciation with St. Emidius*.

No certain conclusions can immediately be drawn about these, nor about a great deal else in the way of meaning for the many food circumstances portrayed in this pungent book. Bendiner knows much about food history and continually enlightens the reader by giving sources; but he has the further virtue of not claiming anything absolute about his sometimes ridiculous but most often resounding interpretations of the paintings. This crisp introduction to a vast theme in art makes the reader long for more, and that may have been the whole idea, as with potato chips. ■

Lorraine Adams
Terror Fiction

INCENDIARY
By Chris Cleave
(Knopf, 237 pp., $22.95)

A WORKING-CLASS WOMAN narrates Chris Cleave's epistolary novel. Suicide bombers have killed her husband, their four-year-old son, and a thousand others during a soccer match at a London stadium. She writes to Osama bin Laden, thinking that if she can make him see her son "with all your heart for just one moment," his attacks will stop. The letter, and the novel, begins:

> Dear Osama they want you dead or alive so the terror will stop. Well I wouldn't know about that I mean rock 'n' roll didn't stop when Elvis died on the khazi it just got worse. Next thing you know there was Sonny & Cher and Dexys Midnight Runners. I'll come to them later. My point is it's easier to start these things than to finish them. I suppose you thought of that did you?
>
> There's a reward of 25 million dollars on your head but don't lose sleep on my account Osama. I have no information leading to your arrest or capture. I have no information full effing stop. I'm what you'd call an infidel and my husband called working-class. There is a difference you know. But just supposing I did clap eyes on you. Supposing I saw you driving a Nissan Primera down towards Shoreditch and grassed you to the old bill. Well. I wouldn't know how to spend 25 million dollars. It's not as if I've got anyone to spend it on since you blew up my husband and my boy.
>
> That's my whole point you see. I don't want 25 million dollars Osama I just want you to give it a rest. AM I ALONE? I want to be the last mother in the world who ever has to write you a letter like this. Who ever has to write to you Osama about her dead boy.

The publication date of *Incendiary* in Britain was July 7th, the very day on which suicide bombers killed fifty-six people on a London bus and three subway trains. On the same day Chatto & Windus, the novel's British publisher, and Waterstone's, the English bookstore chain, withdrew *Incendiary*'s advertising. Throughout the London Underground, posters promoting the novel were already in place. Like the book's cover, they depicted a burning London with the Thames turned red and above it a barrage balloon bearing a picture of a schoolboy. In some posters, there are quite a number of these blimps dotting the skyline. The surreal zeppelins communicate a satirical pseudo-future. No one could mistake the scene for reality. As for terrorism, it's hard to see any.

The same might be said of the novel. To be sure, dear reader has been replaced by Osama, Osama, Osama. Yet *Incendiary*'s claim on the imagination, its literary power, if it can be said to have any, is its narrator's voice. The book is ungrammatical, poorly punctuated, tasteless, and hyperactively honest. Its roughness is supposed to vouch for its authenticity, I suppose. Its cultural references are from television and the tabloids. The narrator's husband, a "copper" for Scotland Yard's bomb disposal unit, is "a QUIET HERO." The narrator, who confesses at once her tendency to sleep around, is "a DIRTY LOVE CHEAT." And from this highly affected voice—for all these badges of authenticity do finally leave an impression of artifice—comes a mode of introspection that is fantastically misinformed and sometimes morbidly fascinating.

Lorraine Adams is the author of HARBOR *(Knopf) and teaches at the New School University.*

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> Sex is not a beautiful and perfect thing for me Osama it is a condition caused by nerves. Ever since I was a young girl I get so anxious. It only needs a little thing to get me started. Your Twin Towers attack or just 2 blokes arguing over a cab fare it's all the same.... I just need something very soft and secret and warm to make me forget it for a bit... It was one of my mum's boyfriends who showed me but I won't write his name or he'll get in trouble. I suppose he was a SICK CHILD PREDATOR but I still remember how lovely it felt.... I'm not proud I know it's not an excuse and I've tried so hard to change but I can't.

So when her husband is out on a dangerous job one night and she has exhausted her usual obsessive-compulsive coping strategies, such as alphabetizing the contents of her freezer, she leaves her son alone to get a drink at the pub. There she meets three Hugo Boss–wearing, Starbucks-patronizing men, or "SNEERING TOFFS." She remarks that many such toffs "have these little excited eyes like they've got a chinchilla up their bum like Hugh Grant in. Well. All his films."

One toff, Jaspar Black, a columnist for the British newspaper *The Daily Telegraph*, has "nice eyes," and looks "almost human." Black has moved to her East London neighborhood, which is now "An Upcoming Bohemian Melting Pot With Excellent Transport Links." Hence, she explains to the Saudi "EVIL MONSTER," owners of "flats in dirty brick tower blocks that smell of chip fat," such as herself and her Vauxhall Astra–owning husband, are forever boxed in by the Aston Martin owners who live in their "Georgian Gems With Extensive Potential." Despite their socio-economic differences, the narrator and Jaspar manage sex together after the pub closes. A few days later, with her husband and son at the fateful soccer match, she runs into Jaspar on the street. They go back to her flat. While sharing intercourse on the couch, with the soccer game on the television, the explosion goes off—yes, just as they do.

IT IS ONLY THE NARRATOR'S VOICE that pulls the reader through this improbable and tiresomely knowing novel in a hurry. It is the sort of voice that certain kinds of critics like to describe as a tour de force; a focus-pulling performance. You realize how awful this voice and what it's telling you are, but it has got you, as the narrator would put it, by the "pubes."

From ad copy to sonnet, every piece of writing can be said to have a voice. These days literary voice is usually considered best when it is idiosyncratic, even eccentric, and thus, recognizable. Voice, in the novel, is now a variety of branding. It is often presumed to be innate; we talk about a writer "finding his voice." But more often than not, voice is contrived, and calls attention mainly to itself. It functions in a novel the way melody sometimes does in pop music: when a tune is catchy, the rest of the song matters less. In fiction, a distinctive voice can ameliorate—or disguise—troubles in character and plot.

Voice certainly functions this way in *Incendiary*. Its best passages are lit with the narrator's incapacity for piety.

> London is a city built on the wreckage of itself Osama. It's had more comebacks than *The Evil Dead*. It's been flattened by storms and flooded out and rotted with plague. Londoners just took a deep breath and put the kettle on. Then the whole thing burned down. Every last stick of it. I remember my mum took me to the Monument to the Great Fire. London burned WITH INCREDIBLE NOISE AND FURY is what the monument has written on it. People thought it was the end of the world. But the Londoners got up the next day and the world hadn't ended so they rebuilt the city in 3 years stronger and taller. Even Hitler couldn't finish us though he set the whole of the East End on fire. Bethnal Green was like hell my grandma said. Just one endless sea of flames. But we got through it. We built on the rubble.

This is welcome, certainly, after the odd and peculiarly fey narrator of Jonathan Safran Foer's recent novel, a precocious tambourine-playing nine-year-old who has lost his father in the World Trade Tower attacks.

In *Incendiary*, the narrator's voice is most persuasive in solitude—sleepless in her hospital bed, and, in the most affecting portion of the novel, discharged from the hospital walking the streets of London on her way home.

> My body was mostly healed. I was carrying Mr. Rabbit and 2 bottles of valium in an Asda carrier bag. It was not warm and not cold. There was no wind and the sky was very low and grey but it wasn't raining. It was like they'd completely run out of weather. I was wearing my white Adidas trackie bottoms. White Pumas. Red Nike T-shirt with the big white tick. I could have been anyone. It was a great comfort.

After getting off a bus, she sees a woman with a boy in a newsstand across the street.

> I went straight across the road with my crutch. A cab nearly killed me. The cabbie screeched his brakes and he called me a stupid slapper. I couldn't of cared less. I went in the newsagent's and I saw my boy straight away. He had his back to me. He was on his own looking up at the drinks fridge. The woman was at the counter buying ciggies. I went straight up to my boy. I dropped my crutch and the carrier bag. I turned my boy round I kissed his face. I picked him up and I gave him a huge hug and I buried my face in his neck.
>
> —Oh my boy my brave boy my lovely boy.

The boy is not her boy. His mother is upset. He is kicking and screaming. The narrator apologizes and limps away. Thereafter in the novel, the narrator sees her son with increasing frequency, sometimes in flames, sometimes disfigured, sometimes carrying his stuffed rabbit. She eventually descends into the permanent delusion that he is alive and that she is taking care of him in her flat.

FOR ALL THE TOUGHNESS OF Cleave's language, his self-congratulatory vernacular, *Incendiary* is sunk in bathos. The vast majority of the novel is a weird cross between Monty Python and Irvine Welsh. This is because Cleave cannot let go of what he really wants to write about, which is not terrorism, but class. The strange accomplishment of this urgent novel about the human consequences of jihadist terrorism is to make jihadist terrorism seem less urgent. For Cleave is more indignant about, more exercised by, something else. His talent for hammerhead satire ends up making terrorism feel copied and pasted into a novel about class. Worse, set against the subject of terrorism, the amount of

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energy Cleave expends in indicting his sneering toffs feels rather like the repeated flattening of a feather with a mallet during an earthquake.

This is jarringly evident in the scenes just after the explosion. As Jaspar yanks on his clothes in front of the television that has just broadcast the carnage, his first thought is getting back to the newspaper. "It'll be all hands to the pump this is huge," says he. The narrator, "standing there all skin and pubes and tears," is hysterically determined to find her son and husband. It's empty careerism for him, uncalculating family love for her. She begs him to drive her to the stadium to find her son and husband. As realism has no purchase in this allegedly hard-boiled book, Cleave efficiently gets the narrator past the ambulances, firemen, police, fire, and smoke and into the stadium. She climbs through the mucilage of blood, puke, body clots, and corpses. But what does she find at the end of this journey? A fan wearing an Arsenal shirt fighting with a fan in a Chelsea shirt, "big lads with bellies.... YOBS THAT GIVE FOOTBALL A BAD NAME."

> The one in the Arsenal shirt was burned very bad you could see the bone showing through his arm. The one in the Chelsea shirt had mostly lost an ear it was hanging off the side of his head upside down. The Arsenal man hit the Chelsea man in the face with his fist and he grabbed a big lump of something the Chelsea one had been carrying. The Chelsea one fell but he stood up again and he kicked the Arsenal man in the privates. Kicked him so hard he dropped the lump again and the Chelsea man grabbed it. Can't you see he's Arsenal you wanker? the Arsenal man shouted. He's one of ours. No shouted the Chelsea man I know who this is we paid 4 million for him last year. Bollocks you did the Arsenal man shouted and he hit the Chelsea man in the stomach and grabbed for the lump but he missed and it rolled across the turf towards me.

When she sees that the lump is the head of a soccer player, she passes out, perhaps because Cleave cannot or does not wish to push his imagination past this dismemberment burlesque. It is a puerile turn. And this sort of thing happens often in *Incendiary*, sometimes alongside some of its strongest passages, such as the hospital scenes and the narrator's walk across London.

Cleave cannot resist an opportunity for send-up, for a vulgar Swiftianism. He even places the novel's most emotional moment in the middle of one. One day Prince William is scheduled to visit the narrator's hospital ward. The windows have been washed, high-tech medical equipment wheeled in, the narrator made right with lipstick and mascara. Suddenly, a woman in a tweed suit pulls the privacy curtain around the narrator's bed and tells her that her son and husband's dental records have confirmed their deaths. The woman leaves, Prince William approaches the narrator's bed, and the cameras draw close as she pukes on his shoes. "I felt so bad. The smell of my puke was rising from the floor. He smiled at me but you could still see him thinking I am the prince of puke and one day I will be king of it."

Cleave decides to focus the novel's latter half on the narrator's relationship with Jaspar and his live-in girlfriend, Petra Sutherland, a fashion columnist. Every episode drives home the same moral. The narrator is poor and ignorant but honest and loving; in sum, real. They are rich and educated, but dishonest and loveless; in sum, phony. And so, when the narrator finally opens the door to her flat for the first time since the day her son and husband died, what greets her are the sounds of Jaspar and Petra having sex in her living room. Petra is in pink stilettos on her hands and knees, playing at being the narrator, calling Jaspar a "posh bugger," while he takes her from behind, whacks her ass red, and calls her "a dirty working class slut."

The narrator politely waits for them to climax on her sofa before saying hello. When Petra and the narrator finally get a look at each other, they see they could be twins. "It was her eyes that made me gasp," the narrator says. "They were my eyes it was as simple as that." Petra occupies scene after scene. Jaspar stalks the narrator. Petra accuses the narrator of stealing Jaspar. Petra realizes Jaspar raped the narrator. Petra apologizes with a shopping spree for the narrator at Harvey Nichols. The narrator moves in with Petra and Jaspar. She dresses like and starts to talk like her. Jaspar mistakes her for Petra.

Incendiary is Cleave's first published novel. He was at work on another when the Madrid bombings occurred. "I was so sickened that I stopped writing the novel I was on and began *Incendiary*," he said in an interview. He described the abandoned manuscript as a comedy set in 1980s Brooklyn about an undertaker and his wife, a pornographer. *Incendiary* would be different. "I wanted to write something very personal, a very simple human story about a victim."

Cleave has made his living as a rave party organizer in Europe, a sailor on the Mediterranean, a bartender in Melbourne, and an online staffer at lastminute.com and *The Daily Telegraph*, Jaspar and Petra's employer. At some point in his travels, he returned to London and found not so much the aftershocks of Madrid or the war on terror but something he had not seen before: "the scorn with which the middle class now hold the working class. People are called 'chavs' and 'pikeys,' which is a way of saying working class," as he told *The Telegraph*. "Why is it suddenly acceptable for middle-class people to go, 'Oh, they're so chavvy?' It really, really offends me. I realize that my life is a hundred times easier just by being born into the middle classes. I can do things like be a writer. There's this incredibly judgmental culture that seems to have arrived recently. There are now these websites called 'chavscum,' with pictures of working-class people."

Incendiary's narrator, before she describes anything about her boy, advises Osama bin Laden to look up these websites. It is only the novel's second page and she is asking him to put down the Kalashnikov and Google *chav, pikey, ned,* and *townie*. Indeed, these websites, with their cameraphone photos of the lower classes accompanied by hate-rich commentary, are vitriolic in a way that only British ridicule can be. They are certainly more disturbing than the posters for *Incendiary* that the book's promoters took down on July 7. They are only slightly more depressing than the fact that the manuscript of *Incendiary* captivated fifteen publishers worldwide and landed a film deal.

Still, none of this cultural foible means much beside the fifty-six dead in London, and thousands upon thousands dead in Madrid, New York, Washington, Afghanistan, and Iraq. The artistic impoverishment that produces novels such as this one is not the worst affliction that we now suffer. Thinking like Cleave doesn't kill anybody. It merely allows the pornographer of his morbid imagination to come cleverly to life. ■

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PHUKET DIARIST

Return to Paradise

AT NIGHT, THE WATERFRONT road at Patong, the most famous beach on the island of Phuket in southern Thailand, resembles a slightly seedy Riviera. All along the strip, paunchy foreign men toss down beers at open-air bars or wander into back alleys with male and female Thai prostitutes. Neon-lit fast-food joints and massage parlors throb with Thai and foreign customers. On the beach itself, a few elderly women sweep up debris from the previous night's parties.

ACROSS PHUKET, THERE ARE FEW HINTS that, only last December, southern Thailand was hit by one of the worst natural disasters in history: the Asian tsunami. In a few places, you can still see shards of broken glass, and several hotels remain boarded up. But some 80 percent of hotels across Phuket are now operating normally. At Patong, entrepreneurial Thais sell DVDs of footage from that fateful day, while other vendors offer T-shirts mocking Thailand's bad luck to be hit by SARS, bird flu, *and* the tsunami in the space of several years. Up-island, a new shopping mall hosts a Starbucks that lures hip young Thais. As someone who was in Thailand during the tsunami and saw its destruction, I found Phuket's recovery truly amazing. What's more, it offers hope for New Orleans.

IN THE DAYS AFTER THE TSUNAMI, which killed more than 5,000 people in Thailand, Phuket and other parts of the Thai coast were plagued by problems like those now facing the United States. A slow initial response from Thailand's national government left immediate recovery to local officials, who were unprepared to deal with the scope of the problem. In Thailand, this meant bodies piling up on southern beaches, rather than citizens stranded in domes and armed gangs roaming the streets, but it posed a danger nonetheless, as the rotting corpses could quickly spread disease. Many of my Thai friends quickly blamed Prime Minister Thaksin Shinawatra for the national government's failure to respond.

BUT THAKSIN DEMONSTRATED THAT A leader could recover from initial missteps. Unlike President Bush, who at first spent relatively little time on the ground in New Orleans and Mississippi, Thaksin quickly flew south and made himself the center of attention, allowing Thais to take comfort in his presence. Thaksin was constantly shown on national television consoling distraught villagers while promising quick and serious recovery efforts—something that clearly helped him politically but that also reassured Thais.

AND, UNLIKE BUSH, WHO PRAISED the head of the Federal Emergency Management Agency, Thaksin demanded accountability. Doubters like myself wondered whether any heads would actually roll, but the prime minister ordered an investigation into the lack of warning about the wave and punished the meteorologists who failed to see it coming. Then he created a national committee to develop a better early-warning system.

AFTER THESE INITIAL EFFORTS, THAILAND also did other things right. Like New Orleans, much of southern Thailand, a region of lush beaches, had been dependent on tourism for economic growth. But, after the tsunami, says Jutamas Wisansing, an expert on tourism at Bangkok's Assumption University, southerners realized they not only had to work hard to bring visitors back but also had to diversify their tourism base, in case former Phuket regulars never returned. Indeed, I watched Thai monks perform a kind of public exorcism designed to reassure repeat Asian travelers worried about ghosts on the island. But, to target new visitors, the Thai government has announced a duty-free zone in Phuket, and airlines flying to southern Thailand have slashed their rates, putting Phuket within easier reach of lower-budget foreign travelers. Southern Thailand has also used promotions to reach out to local tourists, rather than only focusing on foreigners and wealthy Thais from other parts of the country. These could be lessons for New Orleans, which may have to diversify beyond its traditional convention and party industry if it is to revive its tourism economy.

MEANWHILE, THAILAND'S STRONG CIVIL society—the kingdom has an alphabet soup of nongovernmental organizations (NGOs)—took on a major post-tsunami role. The government worked with Coastal Habitats and Resources Management, a multinational project to help affected villagers obtain the loans needed to create and manage new businesses. Other organizations have rebuilt homes across the south and aided southern Thais, who had previously relied upon tourism and fishing, to find new occupations—a vital service in a place like New Orleans, to which some industries, such as tourism and natural gas, might never return.

THAILAND'S POST-TSUNAMI RECOVERY is hardly perfect. North of Phuket, another area called Khao Lak, which was leveled by the tsunami, still shows signs of severe damage. Thaksin himself is a flawed leader, a man with strong authoritarian tendencies who too often refuses to listen to counsel and thus remains vulnerable to making rash decisions about reconstruction. Despite efforts to diversify the tourism sectors, visits to Phuket are still down some 40 percent from before the tsunami. "We're still running below a normal season, though we won't know for sure until high season [this winter]," Megumi Yoshikawa, co-owner of a leading Phuket dive shop, told me. In some places, Thai families have not been able to return to their land because they cannot prove residency. Debt is rising: One Thai NGO estimates that, because of the tsunami, fishermen in Phang Nga, an area near Phuket, now owe nearly $1,000 on average, a sizable sum in a developing country.

STILL, ACROSS THE KINGDOM, THAIS seem relatively upbeat about the future. In Phang Nga, residents of one hard-hit community proudly showed local reporters their new homes, built by Thai NGOs. Many local tour operators I quizzed thought much of their business would recover by the peak season, though they clearly worried it would not. Some Thais even consider themselves lucky—compared with people in New Orleans. Perhaps they should.

JOSHUA KURLANTZICK

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Repeal the Bush Tax Increase

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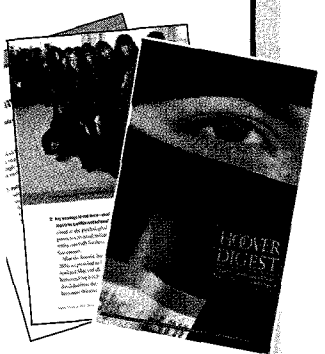

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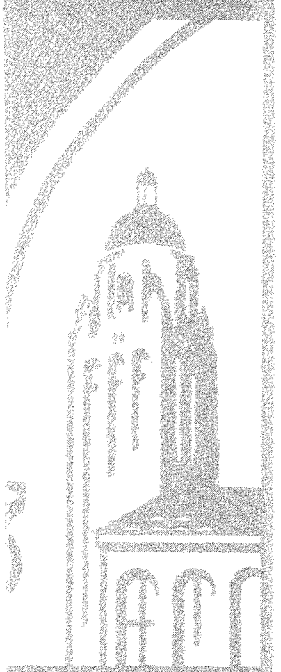

Paid for by the Hoover Institution, Stanford University.

President Bush has appointed a commission to study tax reform and said that he wants to make his tax cuts permanent. However, no major tax reform will occur soon. One modest proposal for immediate reform is to make permanent a Bush tax cut that has been allowed to expire.

I am referring to the bonus depreciation provisions that expired on January 1, 2005, raising taxes for all businesses. Unfortunately, there were no headlines noting this tax increase, possibly because bonus depreciation is an issue that excites only tax economists and accountants. It is important to all, however, because bonus depreciation increases economic growth by encouraging firms to invest.

Under ordinary depreciation, every business, even a corner mom-and-pop grocery, deducts the cost of each investment over its lifetime. For example, if a business buys a $1 million machine that lasts for ten years, it garners a $100,000 tax deduction each year for ten years. Under bonus depreciation, in contrast, it receives a $500,000 "bonus" deduction at the time of purchase and takes a $50,000 deduction each year for ten years. The total tax deductions are equal, but bonus depreciation moves half the deductions to the time of purchase, a valuable change because a dollar today is better than a dollar next year or later. For a business in the 35 percent tax bracket that can borrow at 6 percent, currently the prime rate, bonus depreciation increases the after-tax value of these deductions from $273,059 to $311,530, an increase of more than $38,000. The value is greater for firms that pay higher interest rates and for those constrained by a lack of cash.

To put this in perspective, consider expensing, where the entire purchase price is immediately deducted. With expensing, the government essentially becomes a partner. For example, if a firm is in the 35 percent bracket, the government pays 35 percent of the purchase price through expensing and receives 35 percent of future earnings in taxes, essentially relieving the business of all taxes on the income from its 65 percent. Furthermore, if all investments were expensed and deducted from income, then the tax system would become a consumption tax because consumption equals income minus investment. Therefore, the bonus depreciation provision in force in 2004 cut the tax rate on income from qualifying investments by half and brought the tax code closer to a consumption tax.

Bonus depreciation was enacted in 2003 to help the economy recover from the recession. Many economists have correctly questioned this rationale. The long-run effectiveness of bonus depreciation, and the similar investment tax credit first enacted by the Kennedy-Johnson administration, however, is unquestioned. My work shows that these measures stimulate the economy more per dollar of lost revenue than other kinds of tax cuts and that the benefits are shared by both business and labor because the new investments increase worker productivity and wages.

Bonus depreciation is a simple tax cut, benefits economic growth, and has historically had bipartisan support. Let's bring it back now.

—Kenneth L. Judd

Kenneth L. Judd is the Paul H. Bauer Senior Fellow at the Hoover Institution.

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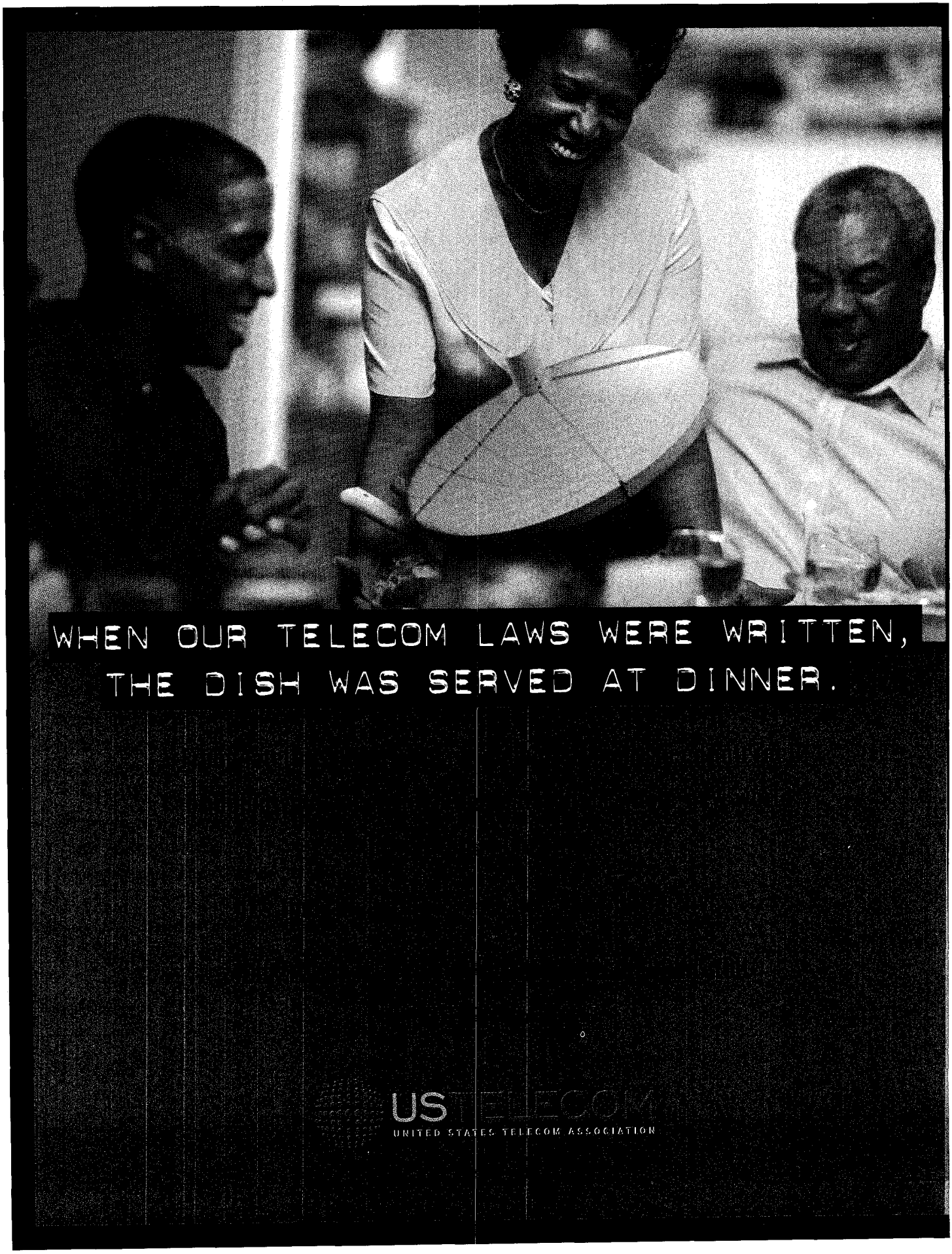

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